IN THE

Supreme Court of the United States

TERM,

No. 77-450

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

W. M. BLUMENTHAL,
Secretary of the Treasury;
J. S. KIMMITT
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal From the United States District Court For the District of Columbia

JURISDICTIONAL STATEMENT

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Dated:

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OPINION BELOW

The July 19, 1977 Order of the United States District Court for the District of Columbia reinstating

its prior (October 12, 1976) Memorandum Opinion and Order is reproduced as Appendix A, *infra,* and is not yet reported in the Federal Supplement. That prior Opinion and Order is reproduced as Appendix B, *infra,* and is reported at 428 F. Supp. 302 (1976).

JURISDICTION

This action was first brought by Appellant, a member of the House of Representatives from the First District of South Dakota, against Appellee Harding, referenced above, and the predecessors of Appellees Blumenthal and Kimmitt (Secretary of the Treasury Simon and Secretary of the United States Senate Valeo) in their official capacities, on May 7, 1976 in the United States District Court for the District of Columbia (see a copy of the Complaint attached as Appendix C, *infra*). It sought (1) a judgment declaring unconstitutional Section 225 of the Revenue and Salary Act of 1967, 2 U.S.C. §§ 351-361 and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, which provide procedures for determining new compensation rates for members of Congress, and (2) to enjoin the increased Congressional salary disbursements under these provisions. The grounds for the action were that those sections, and the disbursements thereunder, violated Article I, Sections 1 and 6 of the United States Constitution.

Pursuant to 28 U.S.C. § 2282 (Repealed by Pub. L. 94-381, § 2, Aug. 12, 1976, 90 Stat. 1119) and § 2284, a three-judge district court was convened which heard Apellant's claims on Cross Motions for Summary Judgment and Appellees' Motion to Dismiss.

On October 12, 1976, the three-judge District Court filed an Opinion sustaining the constitutionality of the statutes in question, Appendix B, *infra.* The Memorandum Opinion concluded with an Order granting summary judgment to Appellees and dismissing Appellant's Complaint. Appendix B, *infra,* at *3a.*

On October 22, 1976, Appellant filed a timely notice of Appeal. Appendix D, *infra.* The Chief Justice of the Supreme Court extended the time period for the docketing of this Appeal to January 20, 1977, on which date Appellant filed his original Jurisdictional Statement.[1]

On May 16, 1977, the Supreme Court vacated the judgment of the United States District Court and remanded the case to that Court for further consideration (Appendix E, *infra*) in light of an amendment to the Salary Act passed by Congress on April 4, 1977 and signed into law by the President on April 12, 1977. Pub. L. No. 95-19.

Pursuant to this remand, Judge Gerhard A. Gesell of the United States District Court for the District of Columbia, on June 15, 1977 directed each party to file with the Clerk of that Court a statement, by July 7, 1977, suggesting what further proceedings were required in this matter. Appendix F, *infra.* Appellant responded by submitting a timely Renewed Motion for Summary Judgment.

On July 19, 1977, the three-judge District Court reinstated its prior Memorandum Opinion and Order,

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[1] *Amici curiae* briefs were filed by, among others, The Honorable James M. Jeffords (Member of the House of Representatives from Vermont). Congressman Jeffords was joined in his brief by seventeen other Congressmen-and-women.

and remarked that, therefore, Appellant's Renewed Motion for Summary Judgment required no action. On August 2, 1977, Appellant filed a timely Notice of Appeal. Appendix G, *infra*. This Court has jurisdiction over the appeal by virtue of 28 U.S.C. § 1253.

QUESTION PRESENTED

Whether the methods of determining salary rates for Senators and Representatives under Section 225 of the Postal Revenue and Salary Act of 1967 and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in compensation for members of Congress without requiring a direct vote by either House of Congress.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1 of the Constitution provides, in pertinent part, that:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 6 of the Constitution provides, in pertinent part, that:

> The Senators and Representatives shall receive a compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.

3. Section 225 of the Postal Revenue and Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 642, is codified at 2 U.S.C. §§ 351-361, and is reproduced as Appendix H, *infra*.

4. The Amendment to § 225(i) of the Salary Act (colloquially known as the Bartlett Amendment), Pub. L. No. 95-19, 91 Stat. 45, codified at 2 U.S.C. § 359 (1), reads, in pertinent part, as follows:

> (1) Within sixty (60) calendar days of the submission of the President's recommendations for the Congress, each House shall conduct a separate vote on each of the recommendations of the President with respect to paragraphs (A) [congressional rates of pay], (B) [rates of pay of certain offices and positions in the legislative branch], (C) [rates of pay of justices, judges and other personnel in the judicial branch], and (D) [rates of pay of offices and positions under the Executive Schedule] of subsection (f) of this section, and shall thereby approve or disapprove the recommendations of the President regarding each such subparagraph. Such votes shall be recorded so as to reflect the votes of each individual Member thereon. If both Houses approve by majority vote the recommendations pertaining to the offices and positions described in any such subparagraph, the recommendations shall become effective for the offices and positions covered by such subparagraph at the beginning of the first pay period which begins after the thirtieth day folowing the approval of the recommendation by the second House to approve the recommendation. (Material in brackets added for clarification).

5. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, 89 Stat. 421, is codified at 2 U.S.C. § 31 and provides, in pertinent part, that:

> (1) The annual rate of pay for—

(A) each Senator [and] Member of the House of Representatives, and . . . ,

(B) the President *pro Tempore* of the Senate, the majority leader and the minority leader of the House of Representatives, and

(C) the Speaker of the House of Representatives,

shall be the rate determined for such positions under Sections 351 to 361 of this title, as adjusted by paragraph (2) of this section.

(2) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under Section 5305 of Title 5 in the rates of pay under the General Schedule each annual rate referred to in paragraph (1) shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100), equal to the percentage of such annual rate which corresponds to the overall percentage (as set forth in the report transmitted to the Congress under Section 5305 of Title 5) of the adjustment in the rates of pay under the General Schedule.

STATEMENT

In every Congress from the First through the Ninetieth, for 178 years, the rates of compensation for Senators and Representatives have been determined "by Law," by an act of Congress specifically setting forth the amount such representatives were to be paid. In past submissions to the United States District Court and to this Court, Appellant has demonstrated, from legislative history, the intent of the Constitution's framers to have Congressional salaries be set thereby.

The Postal Revenue and Salary Act of 1967 (hereinafter "the Salary Act of 1967") and the Executive Cost-of-Living Adjustment Act of 1975 (hereinafter "Adjustment Act") broke with this uniform, continuous tradition, a fact the District Court recognized in its October 12, 1976 Opinion and Order:

> These two interrelated statutes represent a major break with tradition. For almost 180 years since the ratification of the Constitution, the precise compensation of members of Congress was always fixed from time to time by specific legislation without any legislative involvement by the President. at 2.

Specifically, Section 225 of the Salary Act of 1967 established the Commission on Executive, Legislative and Judicial Salaries.[2] 2 U.S.C. § 351. Subsection (f) of Section 225 directs this Commission to conduct in fiscal year 1969, and every fourth fiscal year thereafter, a study of the rates of compensation paid to members of Congress, Justices of the Supreme Court, federal judges, and certain other high-ranking government officials. 2 U.S.C. § 356. The results of these studies, and accompanying recommendations, must be submitted to the President for his review on or before January 1 following their completion. 2 U.S.C. § 357. Under subsection (h) of Section 225, it is then the duty of the President to include in each budget immediately following his receipt of the Commission's report his own

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[2] The Commission consists of nine members, three appointed by the President, two appointed by the President of the Senate, two appointed by the Speaker of the House of Representatives, and two appointed by the Chief Justice of the Supreme Court. 2 U.S.C. § 351(1). The Commission members are appointed to a term that lasts only for the period of the fiscal year with respect to which they were appointed. 2 U.S.C. §§ 352(2)-(3).

recommendations on the rates of compensation for the government officials in question. 2 U.S.C. § 358.

Prior to the Bartlett Amendment, these salary recommendations of the President automatically became effective after 30 days unless (1) a law was enacted establishing a rate of pay other than one recommended, or (2) one House of Congress enacted legislation specifically disapproving all or any part of the Presidential recommendations. 2 U.S.C. § 359 (1). As the Section now stands, after amendment, each House of Congress must conduct a separate vote on each of four paragraphs: "(A) [congressional rates of pay], (B) [rates of pay of certain offices and positions in the legislative branch], (C) [rates of pay of justices, judges and other personnel in the judicial branch], and (D) [rates of pay of offices and positions under the Executive Schedule]." Each House is thereby to approve or disapprove the President's recommendations on each paragraph. If both Houses approve the recommendations for any given paragraph by majority vote, the recommendations become effective for the offices and positions in such paragraph at the beginning of the first pay period commencing after the thirtieth day following the approval of the recommendation by the second House to do so.

It should be noted here that the Bartlett Amendment is prospective only (and it does not take effect until the next quadrennial salary recommendations, approximately four years from now) and does not cure the Constitutional defects in the 1969 and 1977 Salary Act adjustments. Also, being an amendment merely to the Salary Act of 1967, it does not affect the automatic cost-of-living adjustments made under the 1975 Adjustment Act.

The first quadrennial report of the Commission under the Salary Act of 1967 was submitted to the President in December, 1968. It recommended substantial salary increases for all positions under the Act. The January 15, 1969 budget submitted by the President to Congress included a recommendation in favor of the compensation increases suggested by the Commission. No action was taken by Congress concerning these salary recommendations, and as a result, they became effective on February 15, 1969. See 34 Fed. Reg. 2241 (Feb. 15, 1969). This Congressional failure to act within 30 days resulted in Appellees' increasing salary disbursements to members of Congress by 41.67%, from $30,000 to $42,500 *per annum*.

As the second Commission was not appointed until December 1972, it was too late to report to the President by January 1, 1973. Therefore, the second Commission quadrennial report was not submitted to the President until June 30, 1973. Again, sizable salary increases for all officials covered by the Act were recommended, and again the Presidential budget (of February 4, 1974) included the recommendations of the Commission.

The Senate Committee on Post Office and Civil Service reported a resolution on February 28, 1974, S. Res. 293, which would have allowed all provisions of the President's recommendation, with the exception of those providing adjustments in the pay of members of Congress, to take effect. S. Rep. No. 701, 93rd Cong., 2d Sess. (1974). But, this resolution was amended on the floor of the Senate and passed in a form that disapproved all of the recommended salary adjustments. 120 Cong. Rec. 5492-5497, (March 6, 1974); S. Res. 293, 93rd Cong., 2d Sess. (1974).

The third report of the Commission was submitted to the President on December 2, 1976. It recommended salary increases averaging 36.4% for officials covered by the Act. The Commission, however, made these suggestions expressly conditional on the adoption of a strict code of conduct for all the applicable officials, a code which: (1) would require full public disclosure of all outside sources of income; (2) would restrict the nature and amount of outside income that could be earned by an official while in office; (3) would require unambiguous restrictions on expense accounts and vigorous auditing thereof; (4) would include strict conflict of interest prohibitions; and (5) would limit the nature of post-government service employment that would be allowed.

In the January 17, 1977 Presidential budget submitted to Congress, the recommended salary increases were only slightly less than the Commission-suggested ones, and they also were conditioned on the adoption of a strict public conduct code for the officials involved. Under this pay raise, Appellees increased the salaries for members of Congress from $44,000 [3] to $57,500 *per annum*, effective February 17, 1977 (although effective in practice from the pay period starting with March 5, 1977), as Congress did not act within the required 30 days. The House of Representatives voted to consider the February 1977 pay raise on June 29, 1977, as part of its consideration of the Legislative Appropria-

[3] As noted *infra*, at 13, Executive Order 11941 had the effect of raising the salary rate for Senators and Representatives 4.83%, from $44,600 to $46,800 *per annum*. *See* Fed. Reg. 43889, 43894 (October 5, 1976). However, no disbursements of this increase have been made as Congress did not appropriate sufficient funds for such disbursements in the Legislative Appropriations Act of 1977.

tions Act of 1978, 123 Cong. Rec. 6659-60 (daily ed. June 29, 1977). Later that day, the House voted against a bill which would have rejected it, 123 Cong. Rec. 6684-85 (daily ed. June 29, 1977) by a vote of 241 to 181, with two Congressmen answering "present," and nine not voting.

The second statute at issue in this Appeal, the Executive Salary Cost-of-Living Adjustment Act of 1975 (Adjustment Act), extends the annual salary adjustment provisions of the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 5 U.S.C. §§ 5305-5312, to all government officials [members of Congress, Justices of the Supreme Court, federal judges, and certain high ranking officials] previously excluded from its coverage. Specifically, Section 204 (a) of the Adjustment Act provides that the compensation rate for each member of Congress shall automatically be increased every time GS-graded employees receive an annual adjustment under the Federal Pay Comparability Act. The amount of an increase under this section of the Adjustment Act is a percentage equalling the overall percentage by which the GS-salaries are raised (or would have been raised if not for the statutory ceiling on upper level GS-salaries).[4]

As the Congressional salary adjustments under the Adjustment Act of 1975 depend entirely on the adjust-

[4] 5 U.S.C. § 5308 provides that no GS-graded employee may receive a salary in excess of the rate of basic pay level V of the Executive Schedule. Under this provision, all salaries above GS-16 are presently frozen at $47,500 *per annum* [the Presidential recommendation can be found at 42 Fed. Reg. 10297 (Feb. 22, 1977)]. The effects of the statutory ceiling on so-called supergrade GS-salaries are excluded when computing the average percentage at which § 204(a) adjustments to Congressional salaries are made.

ments to the GS-salaries ordered by the Federal Pay Comparability Act, the provisions of the latter statute will be discussed briefly. The Federal Pay Comparability Act of 1970 requires that the President annually adjust the salaries of all GS-graded employees, all armed forces personnel, and other federal employees compensated under a "statutory pay system." 5 U.S.C. § 5305 (a)(2). The amount of each annual adjustment is governed by standards expressly provided by the Act. See 5 U.S.C. §§ 5301 (a)(1)-(a)(4), 5305 (a)-(b). *See generally National Treasury Employees Union* v. *Nixon,* 492 F.2d 587 (D.C. Cir. 1974).

If the President considers it inappropriate to order the total adjustments required by the Act, either because of national emergency or economic conditions, he must submit an alternative plan, and an explanation specifying the reasons therefore to Congress, at least 30 days prior to the normal date for adjustment. 5 U.S.C. § 5305 (c). The alternate plan automatically becomes effective if neither the Senate nor House of Representatives disapproves it within 30 days. If the alternative plan is thusly disapproved by either House of Congress, the President is required to immediately order the adjustments in the full amounts specified by the Act. In either event, the adjustments become effective as of the normal date for ordering adjustments (October 1st).

If an alternative plan is not submitted by the President to Congress, he is under a mandatory duty to order the full amount of the adjustments required under the Act. *National Treasury Employees Union* v. *Nixon, supra,* 492 F.2d at 616. These adjustments become effective immediately and automatically. Under the Act,

Congress has no power to approve or disapprove such adjustments ordered by the President. Its only recourse against a Presidential order providing for a pay adjustment would be repeal of the Act, at least *pro tanto,* enactment of an entirely new schedule of salaries, or refusal to appropriate the sums necessary to fund the adjustment.

The President ordered federal salary comparability adjustments for all federal employees receiving compensation under a statutory pay system on October 6, 1975. Executive Order 11883, 40 Fed. Reg. 47092 (Oct. 8, 1975). This order upgraded the salaries of GS-graded employees by an average of 4.94%. Therefore, Appellees increased salary disbursements to members of Congress, as required by the Adjustment Act by 4.94% (from the $42,500 *per annum* in effect then to $44,600 *per annum*), as required by Section 204 (a) of the Adjustment Act of 1975. On October 1, 1976, the President again ordered federal pay comparability adjustments for all federal employees compensated under a statutory system. Executive Order 11941, 41 Fed. Reg. 43889 (Oct. 5, 1976). The overall average salary increase involved here was 4.83% for GS-graded employees, indicating that the identical rate increase was due Congress under Section 204 (a) of the Adjustment Act—4.83% (from $44,600 to $46,800 *per annum*). As Congress did not appropriate adequate funds for these disbursements in the Legislative Appropriations Act of 1977, Appellees did not increase disbursements to Congressional salary rates under Executive Order 11941.

On March 10, 1977, the Senate passed S. 964 by a vote of 93 to 1. 123 Cong. Rec. 3879-80 (daily ed.

March 10, 1977). This bill denies the comparability pay increase scheduled to take effect on October 1, 1977 (according to estimates of the Congressional Budget Office, the comparability increase scheduled for October 1977 would be somewhere in the vicinity of 6.3%, or approximately $3,500 for members of Congress. The House voted to accept S. 964 on June 28, 1977, 123 Cong. Rec. 6587-93 (daily ed. June 28, 1977), by a vote of 397 to 20 (with 16 not voting). The bill became law on July 11, 1977. Pub. L. No. 95-66, 91 Stat. 270.

On May 7, 1976, Appellant brought this action in the United States District Court for the District of Columbia. Appellant sought a declaratory judgment that Section 225 of the Salary Act of 1967 and Section 204(a) of the 1975 Adjustment Act were unconstitutional insofar as they authorized adjustments to the salary rates for Senators and Representatives without requiring a direct vote of Congress. Appellant also sought to enjoin Appellees from disbursing any amounts of money attributable to Congressional salary adjustments under the Acts in the future. After a three-judge District Court had been convened, Appellant moved for summary judgment. Appellees filed Cross Motions for Summary Judgment and a Motion to Dismiss Appellant's Complaint. After briefs and oral argument on the various motions had been submitted, the three-judge District Court filed a Memorandum Opinion and Order sustaining the statutes in question, granting summary judgment to Appellees, and dismissing Appellant's Complaint. Appendix B, *infra*.

In its Opinion, the District Court acknowledged that the question presented by Appellant was one of first

impression. Memorandum Opinion at 5, Appendix B at 8a. The Court also recognized that the statutory provisions in question delegated a substantial amount of Congress' authority to determine salary rates for its members. Nevertheless, the Court concluded that the two statutes satisfied the requirements of Article I, Section 6, that Congressional salaries "be ascertained by Law" because (i) in passing the statutes themselves, Congress had acted "by law" (*i.e.*, by direct act of Congress); (ii) the delegation of power to ascertain Congressional salaries was not absolute because Congress retained a 30-day veto power for each House, as well as an underlying Congressional power to refuse appropriation of the sums necessary for actual disbursement; and (iii) the language of the Constitution must be read flexibly and, when so read, the ascertainment clause of Article I, Section 6 does not mandate a direct vote of Congress on each adjustment to the salary rates of Senators and Representatives.

Appellant filed a timely Notice of Appeal. Following the Supreme Court's remand of the case to the District Court for further consideration in light of the Bartlett Amendment to Section 225 (i) of the Salary Act of 1967. After having received statements from the parties to the action, the District Court reinstated its prior Memorandum Opinion and Order on July 19, 1977.

Appellant filed a timely Notice of Appeal. Appendix G, *infra*. For the reasons set forth below, Appellant believes that all three of the District Court's conclusions expressed in its reinstated Opinion and Order, and enumerated above, were in error, that the claim presented in this case is a substantial one requiring

plenary consideration in this Court, and, therefore, that probable jurisdiction should be noted.

THE QUESTION PRESENTED IS SUBSTANTIAL

A. Appellant's Interpretation of Article I, Section 6 Is Supported by Prior Decisions, the Constitutional Debates, and the Contemporaneous Conduct of the Early Congresses

1. As stated, Article I, Section 6 of the Constitution requires that the compensarates of Senators and Representatives are to be "ascertained by Law." This phrase, "by Law," clearly means "by act of Congress," not only from the legislative history and intent of the framers of the Constitution, but also from judicial construction. Cases construing analogous language in other parts of the Constitution [5] have unanimously concluded that the phrase "by Law" means "by act of Congress."

For example, in *Cincinnati Soap Company* v. *United States*, 301 U.S. 308 (1937), this Court stated that:

> The provision of the Constitution (cl. 7, § 9, Art. I) that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" . . . means simply that no money can be paid out of the Treasury unless it has been appropriated by *an Act of Congress*. 301 U.S. at 321 (emphasis supplied).

Also, *Cain* v. *United States*, 73 F.Supp. 1019, 1021 (N.D. Ill. 17947) defines the phrase "by Law" as meaning "by specific legislation." [*Cain* construed Ar-

[5] In addition to Article I, Section 6, the phrase "by Law" appears in Article I, Section 2, clause 3; Article I, Section 4, clauses 1 and 2; Article I, Section 9, clause 7; Article II, Section 2, clause 5; Article II, Section 1, clause 2; and Article III, Section 2, clause 3.

ticle II, Section 2 of the Constitution, which provides that . . . "the Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments . . ."]

When the reasoning of these cases is applied to the ascertainment clause, it clearly requires that the salary rates of Senators and Representatives "shall be ascertained by [act of Congress]," that is, by a direct vote of both Houses of Congress, followed by the signature of the President.

2. Appellant's reading of the ascertainment clause has further support in the Constitutional Convention and Ratification Debates on the pay provisions of Article I, Section 6. Under the Articles of Confederation, delegates to the National Assembly were paid by the states they represented. Articles of Confederation, Article V, Section 2. The pay provisions of Article I, Section 6, were intended as a change from this scheme, a change which would ensure that members of Congress be free to act for the good of the federal government without being subjected to the whims of the local state governments. *See, e.g.*, 5 Elliot, Debates on the Adoption of the Federal Constitution, 227-228 (1888); 1 Farrand, Records of the Federal Convention of 1787, at 373-374 (1937).

In response to objections that Congress should not be allowed unlimited power to set their own salaries, it was repeatedly stated that the public accountability of Senators and Representatives through the re-election process would operate as a sufficient check on Congressional enactment of excessive salaries. Thus, in the

Massachusetts ratification debates, Delegate Sedgwick defended Article I, Section 6, in the following terms:

> Can a man, he asked, who has the least respect for the good opinion of his fellow-countrymen, go home to his constituents after having robbed them by voting himself an exorbitant salary? This principle will be a most powerful check; and, in respect to economy, the power, lodged as it is in this section will be more advantageous to the people, than if retained by the State legislatures.

Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, 152-153 (1856).

Similarly, in the Virginia ratification debates, Madison explained and defended Article I, Section 6, in the following terms:

> Mr. Chairman.—I most sincerely wish to give a proper explanation on this subject, in such a manner as may be to the satisfaction of every one. I shall suggest such consideration as led the convention to approve this clause. With respect to the right of ascertaining their own pay, I will acknowledge, that their compensations, if practicable, should be fixed in the constitution itself, so as not to be dependent on congress itself, or on the state legislatures. The various vicissitudes, or rather the gradual diminution of the value of all coins and circulating medium, is one reason against ascertaining them immutably; as what may be now an adequate compensation, might, by the progressive reduction of the value of our circulating medium, be extremely inadequate at a period not far distant.
>
> It was thought improper to leave it to the state legislatures, because it is improper that one government should be dependent on another: and the great inconveniences experienced under the old

> confederation, shew, that the states would be operated upon by local considerations, as contradistinguished from general and national interests. . . . The power vested in Congress to set its members pay *is a power which cannot be abused without rousing universal attention and indignation. What would be the consequence of the Virginia legislature raising their pay to four or five pounds each per day? The universal indignation of the people. Should the general congress annex wages disproportionate to their service, or repugnant to the sense of the community, they would be universally execrated. The certainty of incurring the general detestation of the people will prevent abuse. . . .*
>
> But the worthy member supposes that congress will fix their wages so low, that only the rich can fill the offices of senators and representatives. Who are to appoint them? The rich? No sir, the people are to choose them. *If the members of the general government were to reduce their compensations to a trifle, before the evil suggested could happen, the people could elect other members in their stead, who would alter that regulation.* . . . I think the evil very remote, and if it were now to happen, the remedy is in our own hands, and may to ourselves be applied. . . . 3 Farrand, *supra* at 314-316 (emphasis supplied).

3. The interpretation of Article I, Section 6, advanced in the Convention and Ratification Debates is fully confirmed by the contemporaneous conduct of the early Congresses. The first Congress established the rates of pay for Senators and Representatives by act of Congress. Act of September 22, 1789, 1 Stat. 70. In fact, as previously stated, every Congress prior to the enactment of the Salary Act of 1967 had adjusted the salary rates for its members solely by direct act of Congress. This early and time-honored tradition, sup-

ported by the legislative history in question, reflects the only appropriate construction of Article I, Section 6. *Cf. Myers* v. *United States,* 272 U.S. 52, 174 (1926).

4. If members of Congress find it an embarrassment to set their own salaries, it is obviously, as apparent from the above material, an embarrassment intended by the Founding Fathers. Article I, Section 6, was intended to maintain public acountability with respect to Congressional salaries, by permitting increases only by *specific legislation* in Congress, put to a vote, and passed in the manner of regular pieces of legislation.

Appellees have mentioned the "necessary and proper" clause of the Constitution (Article I, Section 8) as authority for upholding the constitutionality of the Salary Act of 1967 and the Adjustment Act. However, that clause only allows Congress discretion *vis-a-vis* the means by which the powers granted it by the Constitution are to be carried out. These means must be appropriate and suitable, and the end must be legitimate and within the scope of the Constitution. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat) 316 (1819). In the instant situation, this can clearly not be said to be the case. The Constitution speaks plainly; Congressional salaries must be "ascertained by Law." The necessary and proper clause cannot be utilized to avoid both the specific language and the underlying intent of the Constitution merely because of convenience. The "growing complexity of all governmental functions" (the October 12, 1976 Order of the District Court, at 7, Appendix B, at 3a) cannot be used as an excuse to circumvent the restraints and obligations placed upon Congress by the Constitution. And the neglect by Congress of its Constitutional duty to ascertain the salaries of its own members, with the transferring of this role instead to the President and a Commission under the provisions of the Salary and Adjustment Acts clearly constitutes an improper delegation of authority. *A.L.A. Schechter Poultry Corp., et al.* v. *United States,* 205 U.S. 495 (1935).

From the preceding, it is apparent that "ascertainment by Law" is an active phrase, requiring direct action by Congress. Retaining a right to veto under the old provisions of the Salary Act of 1967 or responding to Presidential initiative under the terms of the Bartlett Amendment cannot possibly be considered "ascertainment" by Congress of the salary rates that its members should be paid.

Under the Adjustment Act, the Constitutional violation is even more evident. Salary adjustments ordered under this Act take effect automatically. Congress may take no affirmative action; it has only veto powers. 5 U.S.C. §§ 5305 (d)-(k).

The propriety of any form of Congressional veto is also questionable, as legislative veto provisions raise a number of Constitutional questions, among them those involving the separation of powers. Two recent cases dealing with legislative vetoes are *Clark* v. *Kimmit,* Sup. Ct. Docket No. 76-1105 (filed February 9, 1977, *aff'd due to lack of ripeness,* June 6, 1977 45 U.S.L.W. 3785 (June 7, 1977), and *Atkins, et al.* v. *United States,* Ct. Cl. Docket No. 41-76 (decided May 18, 1977); Sup. Ct. Docket No. 77-214 (filed August 8, 1977). Unlike enacting legislation, a Congressional veto does not initiate or make policy, it only responds to it. The merely negative effect of the Congressional veto results in a Congressman's vote not carrying the same responsi-

bility in this area as would his vote on a specific piece of legislation. The net effect is the lessening of Congressional accountability to its national constituency, the American people.

5. The substantiality of the question presented in Appellant's case is not affected by the passage of the Bartlett Amendment to Section 225(i) of the Salary Act of 1967, *supra*. As decided by the District Court, in its July 19, 1977 Order reinstating its prior Memorandum and Order, Appendix A, *infra:*

> After giving consideration to this new legislation and to written submissions from the parties it appearing to the Court that this legislation, which becomes effective in 1980 or 1981, does not affect plaintiff's [Appellant's] claims, either (1) that the 1969 and 1977 Salary Act adjustments presently in effect are inconsistent with Article I, Section 6, of the Constitution, or (2) that the Adjustment Act procedures are inconsistent with Article I, Section 6 . . . at 1. (Material in brackets added.)

Appellant agrees with the District Court that the Bartlett Amendment to the Salary Act of 1967, in no way affects the substantive issues of this case. Although requiring a Congressional vote on Presidential salary recommendations pursuant to the Act within 60 days of those recommendations, the fact remains that it should be at the initiative of Congress, not a Commission or the President, that Congressional pay raises are proposed and voted on, in separate pieces of legislation. This requirement is clearly delineated in the Constitution itself.

The argument that Congress retains ultimate authority over Congressional salaries by refusing to appropriate sufficient sums to fund the salary levels set by the procedures in the statutes in question is a weak one. Article I, Section 7 of the Constitution provides that no moneys are to be drawn from the Treasury except in "Consequence of Appropriations made by Law." If an appropriation bill could suffice as retaining Congressional authority to ascertain the salaries of Congressmen and Senators, "by Law," Article I, Section 6 of the Constitution would be superfluous.

Additionally, as stated previously in this submission, the Bartlett Amendment is prospective only [and it does not take effect until the next Presidential quadrennial salary recommendations, that is, not until 1980 or 1981]. It, in no way, cures the Constitutional defects in the Congressional salary adjustments which have already occurred under the 1967 Salary Act, adjustments which were made under a Statute providing for, in addition to its other Constitutional problems mentioned herein, a single house vote, in violation of the basic principles of bicameralism on which the United States system of government is founded. 2 U.S.C. § 359 [prior to Pub. L. No. 95-19, 91 Stat. 45]. These adjustments alone have been responsible for raising Congressional salaries by some $23,200 annually. Disbursements occurring under these adjustments are improper, and Appellant seeks to enjoin all such further disbursements. [It is realized that funds already disbursed cannot be retroactively recalled; yet Appellant wants to ensure that in the future no such Constitutionally improper disbursements occur.]

Finally, the Bartlett Amendment alters only the wording of the Salary Act of 1967. It does not affect automatic cost-of-living adjustments made annually

to Congressional salaries under the 1975 Adjustment Act, a key element of Appellant's case.

B. The Reasoning of the District Court Is in Error

1. The District Court rejected Appellant's claim, at least initially, on the ground that "when Congress passed the Acts governing its compensation it acted 'by law'." It is, of course, true that the 1967 Salary Act and the 1975 Adjustment Act were enacted "by law" in that there were no procedural irregularities in the legislative process. However, this, in itself, is no answer to Appellant's claims. Appellant contends that it is the Congressional salary rates themselves which must be ascertained by act of Congress. This requirement is not satisfied by the fact that a procedurally regular act of Congress has established various commissions and procedures by which the executive branch ascertains the salary rates to be paid to members of Congress.

2. The District Court also concluded that the statutory procedures in question effectively resulted in an ascertainment "by law," as Congress has retained a veto power in each House over recommended adjustments. Admittedly, each House of Congress does have a theoretical veto power over all or any parts of the salary adjustments recommended by the President under the 1967 Salary Act. However,the non-exercise of this theoretical veto power falls far short of an ascertainment by Congress of the salary rates that its members should be paid.

First, Congressional inaction is a passive fact that never could be considered an affirmative act of ascertainment, as required by Article I, Section 6.

Second, even if Congressional inaction can be viewed as tantamount to an affirmative ascertainment, the failure of Congress to act gives the American voters no record of their Senators' and Representatives' stand on a salary increase that has taken effect. The latter point is crucial because the Ratification Debates on the Congressional pay provisions of Article I, Section 6, clearly demonstrate an expectation that public accountability would operate as an adequate check on Congress' power to set its own salary rates.

Finally, the veto power retained by Congress in the Salary Act of 1967 is so severely limited by practical considerations that it cannot be considered the effective equivalent of a direct act of Congress. The exercise of the veto power is limited to a 30-day period, which makes the normal parliamentary process of hearings, report, debate, and final vote wholly impracticable. Moreover, as the experience in 1974 demonstrated, the consideration of Congressional salary recommendations under the Salary Act necessarily becomes confused with extraneous or conflicting considerations regarding the salary recommendations for officials other than members of Congress.

The Bartlett Amendment's failure to remedy the Constitutional problems of the Salary Act of 1967 will not be belabored as it has been discussed previously herein.

When turning from a study of the Salary Act of 1967 to the 1975 Adjustment Act, the inadequacy of the Congressional veto power becomes even more apparent. The Adjustment Act, as stated, contains no standards. It merely grants an automatic increase in Congressional salaries equal to the overall average of ad-

justments made to GS-grade salary schedules under the Federal Pay Comparability Act, *supra*. Any standards dealing with pay increases under the Adjustment Act are concerned solely with the appropriateness of the salary levels of other statutory federal employees, not Senators and Congressmen, whose salaries are automatically to be increased without regard to the propriety for such increases. Under the Adjustment Act, Congress normally does not have the opportunity for disapproval, or, if it is a disapproval, it is one tied to an appropriations bill, not only rejecting Congressional pay increases, but also federal statutory employees' pay increases.

Congress normally does not even have the opportunity to submit a legislative veto. It is only when the President submits an alternative plan (such as a smaller adjustment than would be necessary under Federal Pay Comparability Act Standards) that Congress has a legislative veto, 5 U.S.C. § 5305(c)(2), requiring the President to comply with the amount specified by Federal Pay Comparability Standards. 5 U.S.C. § 5305(m).

This situation is in clear violation of Article I, Section 6 of the Constitution which requires Congressional salaries to be dealt with separately from those of other federal employees to ensure public accountability. In the past ten years, Congressional salaries have been increased by 56% without a single Act having been passed by Congress. Furthermore, necessary increases in federal, executive and judicial salaries have not occurred because, under the provisions of the Salary and Adjustment Acts, they were tied to Congressional pay increases deemed by Congress to be politically unwise or

not necessary. The time has come to revert back to the Constitutionally-mandated system of setting the rates of Congressional compensation, separate and apart from other government officials' salaries, by a simple, direct Act of Congress.

3. The District Court opinion suggests that, since Congress can refuse to appropriate sufficient sums to fund the salary levels set by the challenged statutes, it has retained the final power to ascertain the true salaries actually paid. However, the District Court's reliance on the appropriation power is no answer to Appellant's claim.

Article I, Section 7, provides that no moneys shall be drawn from the Treasury except "in Consequence of Appropriations made by law." Under the District Court's reasoning, the separate requirement in Article I, Section 6, of an ascertainment by law is rendered superfluous if an appropriation bill could suffice as an ascertainment. In the context of this case, Article I, Section 6, and Article I, Section 7 clearly require that the salary rates for Senators and Representatives must be ascertained by act of Congress and paid from the Treasury only when there has been an appropriation by act of Congress.

The District Court's reliance on the appropriations power to satisfy the ascertainment clause also fails to recognize the inherent limitations of the appropriations process. If, for example, Congress believes the salary rates set under the 1967 Salary Act of the 1975 Adjustment Act are too low, no appropriation of additional sums could authorize disbursements at a higher rate. Moreover, to the extent that the appropriation power can be used as a partial veto of salary increases,

it is an extremely impractical tool. The practical, as well as the parliamentary considerations involved in the passage of an appropriations bill make it wholly unsuitable as a vehicle for ascertaining the propriety of Congressional salary levels. Moreover, the subtle intricacies of using an appropriations bill as an indirect method of ascertaining Congressional salaries would completely subvert the policy of public accountability implicit in Article I, Section 6.

4. The Opinion of the District Court also suggests that the recommendations of the Commission under the Salary Act of 1967 are at least partially determined by Congress because two of the nine Commission members are appointed by the Speaker of the House, and two more are appointed by the President of the Senate (*i.e.*, the Vice-President of the United States). Yet, it is clear that the mere fact of appointment by a member of Congress, or by a Congressional officer, does not ensure that the appointee is able to, or even disposed to, accurately represent all of the views present in Congress. Further, Article I Section 6 of the Constitution mandates Congress, itself, and not a Commission, with a minority of Congresional representatives, as ascertain the salary rates for Senators and Representatives.

The final ground upon which the District Court relied in its Opinion was that the language of the Constitution:

> . . . is not to be parsed in the narrow, rigid, manner of a statute. It must remain flexible and adaptable, placing reliance upon the checks-and-balances built into our tri-parts format and the sound attitude of voters expressed at the polls.

Memorandum Opinion at 7-8, Appendix B.

The Constitution is quite evidently an organic document, one that must be read and interpreted in light of major changes in United States' society. However, there have been no changes in our society which presage a need for altering the process of setting salary rates for Senators and Representatives. For 178 years the rates of Congressional compensation were set by a simple, direct act of Congress. This process frequently proved politically embarrassing to the members involved, but that embarrassment was merely a manifestation of the public accountability intended by Article I, Section 6. No changes in our society would make direct Congressional ascertainment of members' salaries more difficult now than was true for the first Congress in 1789.

Indeed, if anything, it has become apparent from the experiences under the Salary Act of 1967 and the 1975 Adjustment Act, that the most efficient and just manner for determining Congressional compensation is by a direct act of the representatives involved. In the ten years since the passage of the Salary Act of 1967, the method of determining rates of compensation for most high ranking federal executives and judicial officers has been inextricably intertwined with the politically sensitive question of ascertaining Congressional pay. As a direct result, the worst of both worlds has been realized. On the one hand, Congressional salaries have increased, as stated previously herein, 56% in ten years without passage of a single Act of Congress to which the American voters can look in judging the performance of their Senators and Representatives. On the other hand, badly needed increases in federal executive and judicial salaries have been rejected outright, or frustrated in the appropriations process, solely be-

cause they were intertwined with increases in Congressional pay that Congress believed to be uncalled for or politically unwise.

C. Appellant's Claim Raises Important Questions of Public Policy

Even if one ignores the doubtful nature of the District Court's reasoning, Appellant's claim is of such importance that this Court should decide it only on the basis of full briefing and oral argument.

From an economic standpoint, very substantial sums of public finances are at stake. The increases in Congressional salaries recommended in the most recent quadrennial Commission report by themselves will require additional expenditures in excess of $7 million annually.

From a social policy standpoint, the case is doubly important. First, it is apparent that the inadequacy of salaries for high ranking federal executives and judicial officers is a very serious and growing problem. Appellant submits that no scheme of salary adjustment will ever solve this problem until the discrete and politically sensitive question of ascertaining Congressional salaries is returned to its traditional and Constitutionally mandated area. Second, it is also clear that there is a popular belief that Congress is not sufficiently accountable to the public. Appellant's claim, if sustained, would restore the public accountability with respect to Congressional salaries that Article I, Section 6 intended.

D. Appellant's Claim Will Not Subvert the Methods of Ascertaining Non-Congressional Salaries or Result in any Undue Hardship to Members of Congress

Although the issues presented by Appellant are of great importance, it should be noted Appellant is limiting his claim in three significant respects.

1. Appellant is not attacking the entire salary revision structure established by the Salary Act of 1967 and the 1975 Adjustment Act. His claim, like Article I, Section 6 of the Constitution itself, is restricted solely to the question of Congressional salaries. Appellant seeks to enjoin only those salary disbursement increases that are paid under these two Statutes to members of Congress. The propriety of the Acts, insofar as they create a procedure for determining executive or judicial salaries, is not affected by Appellant's arguments. The method of determining non-Congressional salaries under the Acts is readily severable from the methods for ascertaining Congressional ones, and the injunctive relief sought by Appellant would not affect the operation of the Statutes in areas where non-Congressional salaries are in question.

2. Appellant is seeking prospective injunctive relief only. Although Appellant has donated substantially all of his share of the disbursement increases ordered under the Acts since his election to Congress to charity, it is evident that retroactive equitable relief would be inappropriate here. *Cf., Chevron Oil Company* v. *Hudson,* 404 U.S. 97, 106-107 (1971). Therefore, Appellant requests injunctive relief only in regard to future disbursements of increases in Congressional salaries that have been authorized under the Salary Act of 1967 and the 1975 Adjustment Act.

3. Appellant's claim is concerned solely with the rates of Congressional salaries. It, therefore, does not directly the claims in *Atkins, et al.* v. *United States,* Ct. Cl. Docket No. 41-76 (decided May 18, 1977); Sup. Ct. Docket No. 77-214 (filed August 8, 1977), currently before this Court on the question of judicial pay rates. [*Atkins,* as the Court is aware, was initiated as a suit by several judges who claimed that their salaries had been reduced in violation of Article III, Section I of the Constitution, because the real dollar value of their compensation has steadily declined since the date of their appointment.] However, at both *Atkins* and Appellant's case raise timely and important Constitutional questions in the area of legislative vetoes, joint consideration by the Court of these two cases on the issue of the propriety of such vetoes is respectfully requested.

CONCLUSION

For all of the reasons stated above, Appellant submits that the question presented in this Appeal is substantial and that the Court should note probably jurisdiction and decide the case only upon full briefing and oral argument.

Respectfully submitted,

LARRY PRESSLER
1132 Longworth House Building
Washington, D.C. 20515
(202) 225-2801

Appellant, *Pro Se*

Dated:

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-782

LARRY PRESSLER, Member, United States House of Representatives, *Plaintiff*,

v.

W. M. BLUMENTHAL, Secretary of the Treasury;
J. S. KIMMITT, Secretary of the United States Senate;
KENNETH R. HARDING, Sergeant-at-Arms of the United States House of Representatives, *Defendants*.

(FILED JULY 19, 1977)

JAMES F. DAVEY, Clerk

Order

On May 16, 1977, the Supreme Court of the United States vacated the Judgment of this Three-Judge Court and remanded "for further consideration in the light of the new legislation." The new legislation to be considered is the amendment to the Postal Revenue and Federal Salary Act approved by the President on April 12, 1977.

After giving consideration to this new legislation and to written submissions from the parties it appearing to the Court that this legislation, which becomes effective in 1980 or 1981, does not affect plaintiff's claims, either (1) that the 1969 and 1977 Salary Act adjustments presently in effect are inconsistent with Article I, Section 6, of the Constitution, or (2) that the Adjustment Act procedures are inconsistent with Article I, Section 6,

Now THEREFORE after such further and full consideration the Court most respectfully reinstates its prior Memorandum Opinion and Order in this case. Plaintiff's renewed motion for summary judgment accordingly requires no action.

So ORDERED.

/s/ EDWARD ALLEN TAMM
United States Circuit Judge

/s/ GERHARD A. GESELL
United States District Judge

/s/ THOMAS A. FLANNERY
United States District Judge

July 19, 1977.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 76-782

LARRY PRESSLER, Member, United States House of Representatives, *Plaintiff*,

v.

WILLIAM E. SIMON, Secretary of the Treasury;
FRANCIS R. VALEO, Secretary of the United States Senate;
KENNETH R. HARDING, Sergeant-at-Arms of the United States House of Representatives, *Defendants*.

Before TAMM, *Circuit Judge*; GESELL, *District Judge*; and FLANNERY, *District Judge*.

Memorandum Opinion and Order

(FILED OCTOBER 12, 1976)

PER CURIAM. This action seeks a judgment declaring that those sections of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.* ("Salary Act") and the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31 ("Adjustment Act"), which provide procedures to set new rates of compensation for members of Congress are unconstitutional, and to enjoin increased disbursements to members of Congress under the Acts. Plaintiff, The Honorable Larry Pressler, is a member of the United States House of Representatives from the First Congressional District of South Dakota, first elected in November, 1974.

The issues come before this Court on cross-motions for summary judgment, and defendants' motions to dismiss.[1] Argument was heard by this three-judge district court pursuant to 28 U.S.C. § 2284.

The Salary Act established a Commission on Executive, Legislative and Judicial Salaries ("the Commission"). At four-year intervals the Commission must recommend to the President pay rates for Senators, Representatives, Federal Judges and certain officials in the Legislative, Judicial and Executive branches of Government. After receiving the Commission report, the President is required to submit in the next budget message his recommendations as to the exact pay rate for those positions covered by the Salary Act. The pay rates thus recommended by the President for the different positions, including members of Congress, become effective 30 days after the budget is submitted to Congress unless other rates have been enacted by law, or one House of Congress specifically disapproves all or part of the recommendations.

The Adjustment Act provides for automatic cost-of-living adjustments in the salaries of members of Congress and other Executive, Judicial and Legislative officials. It provides in § 204(A) that congressional salaries determined by the Salary Act procedures will be automatically increased by an amount equal to the present increase being made by the President in the rates of pay of federal employees covered by the General Schedule as provided in 5 U.S.C. § 5305.

These two interrelated statutes represent a major break with tradition. For the almost 180 years since the ratification of the Constitution, the precise compensation of members of Congress was always fixed from time to time by

[1] The Honorable James M. Jeffords, Member At Large of the United States House of Representatives from Vermont, filed a brief *amicus* in support of plaintiff's position.

specific legislation without any legislative involvement by the President.

The first recommendations by the Commission under the Salary Act were made in December, 1968. The President's subsequent recommendations took effect in February, 1969, without any action by the Congress, and congressional salaries were increased from $30,000 to $42,500 per annum. Mr. Pressler was not yet a member of the House. In February, 1974, after Mr. Pressler took office, the President's salary recommendations following the second Commission report were submitted to Congress. The Senate, by resolution, rejected all pay increases. The next Commission is expected to report to the President by January, 1977.

In October, 1975, Executive Order 11883, 40 F.R. 47091, increased General Schedule salaries and accordingly congressional salaries covered by the Adjustment Act were automatically increased from $42,500 to $44,600 per annum. In September, 1976, Congress refused another automatic pay increase in congressional salaries under the Adjustment Act by refusing to appropriate necessary funds in the Legislative Appropriations Act for 1977.

Congressman Pressler claims that the Salary Act and the Adjustment Act, whose operation has just been reviewed, violate Article I, Section 1, of the Constitution, and, more importantly, Article I, Section 6, of the Constitution, which states in pertinent part:

> The Senators and Representatives shall receive a Compensation for their Services to be ascertained by Law,
> . . . .

He claims that the payment of congressional salaries by defendants pursuant to the statutes in question injure him as a member of the House of Representatives by depriving him of his constitutional duty to vote on each ascertainment of congressional salaries.

I. *Standing*

It is initially argued that Congressman Pressler has no case or controversy with the defendants and, thereby, lacks standing to assert his claims. He sues as a citizen, a taxpayer, and a Congressman. It is only in this latter capacity that he can be heard, if at all. *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa. 1970), *aff'd,* 401 U.S. 901 (1971).

A Congressman has standing to sue by reason of his office where Executive action has impaired the efficacy of his vote, *Kennedy* v. *Sampson,* 511 F.2d 430, 436 (D.C. Cir. 1974); *cf. Coleman* v. *Miller,* 307 U.S. 433 (1939), or certain other congressional duties. *Mitchell* v. *Laird,* 488 F.2d 611 (D.C. Cir. 1973). The resulting injury under such circumstances is said to create a personal stake in the outcome sufficient to assure that a suit by a Congressman affected would be in a proper adversary context. *Kennedy* v. *Sampson, supra; see Baker* v. *Carr,* 369 U.S. 186 (1962). Congressman Pressler alleges not that the efficacy of his legislative vote was impaired by the Executive, but rather that his vote was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution. While it is clear that legislators have no special right to invoke court consideration of the validity of a statute passed over an objecting vote, *Korioth* v. *Briscoe,* 523 F.2d 1271 (5th Cir. 1975), where, as here, a member of Congress alleges he is prevented from voting to perform a specific legislative duty expressly mandated by the Constitution, the suit may be cognizable by the courts so long as there is no attempt being made to interfere with the internal workings of the Congress itself.[2]

---

[2] If there were such an interference this case might present a political question, as was argued by defendants. But where statutes enacted by Congress are questioned under a specific constitutional clause, the political question doctrine should not be applied by the courts merely because a decision might have political consequences.

Mr. Pressler's suit meets this requirement, but he must show that *he* has been, or will be, injured before standing is recognized. *Warth* v. *Seldin,* 422 U.S. 490 (1975). Plaintiff's theory of injury is somewhat unclear, but sufficient facts have been alleged at this stage to support his claim of injury in fact. Under the Salary Act and the Adjustment Act the status quo as to congressional salaries may be altered without affirmative action by both Houses of Congress. While salaries may be changed in the traditional fashion, the availability of the procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious.

In 1969, congressional salaries were raised by the new process for the first time. But Mr. Pressler was not yet a member of Congress and cannot claim his vote was impaired. In 1974, a proposed salary increase was vetoed by a Senate Resolution. The status quo was unaltered and we can see no injury to Mr. Pressler, though he was then a Congressman. While the next Commission should report to the President shortly, any injury from this action is far too speculative to support standing.

However, in October, 1975, congressional salaries, including Mr. Pressler's, were raised under the Adjustment Act. This change was effected without action by the House and Senate. This circumvention of the traditional legislative process impaired the efficacy of Mr. Pressler's vote. He has, therefore, standing to challenge the Adjustment Act. But that Act increases, on a percentage basis, the compensation as determined by Salary Act procedures. For this reason, Congressman Pressler has standing to challenge both pieces of legislation. Accordingly, standing will be afforded under the unique circumstances of this particular case.

II. *Ascertainment Clause*

Turning to the merits, the Court is asked to interpret the meaning and effect of the ascertainment clause in Article I, Section 6, of the Constitution. This is a matter of first impression.

Plaintiff contends that the phrase "to be ascertained by Law" constitutes an explicit mandatory requirement that whenever the compensation of members of Congress is redetermined it must be fixed at that time by a law that specifically states the amount to be paid and that the proposal, like any law, should then be open for debate and vote by the members of each House. Plaintiff urges, in short, that Congress is required itself to fix its pay and that that responsibility in this regard cannot, in effect, be delegated or by-passed in the fashion provided by the Salary Act and the Adjustement Act which allows periodic pay increases to take effect without affirmative congressional action.

For the reason set forth below, it appears to the Court that plaintiff's grievance is directed to what is essentially a matter of form rather than substance, and that Congress has established its compensation "by law" within the requirements of Article I, Section 6, when that section is read, as it must be, against accepted principles governing interpretation of the Constitution as a whole.

At the outset it should be noted that when Congress passed the Acts governing its compensation it acted "by law," as plaintiff himself concedes. The suggestion is, though, that the ascertainment is by others, not by the Congress. However, not only does the Commission which recommends pay levels contain members representing each House of Congress, but even in this circumstance the delegation is not absolute. When the President submits recommendations either House, acting alone, can by negative vote prevent the recommendations from taking effect. And

Congress has not stopped here. In the Salary Act it has explicitly reserved the right to enact legislation fixing congressional compensation regardless of what recommendation it receives from the President. As already noted, it also retains this right under the Adjustment Act by the use of its appropriation powers. Congress, by law, recently rejected an Adjustment Act pay increase by asserting its continuing authority always to fix its own pay.

Thus, it only remains to consider whether or not the verb "ascertain" has such a narrow and limiting effect that, as a matter of constitutional law, it was intended to prevent the Congress from developing rational procedures of this type for fixing congressional compensation by means other than enacting a specific statute fixing each pay change. Unfortunately no light is thrown on this subject by *The Federalist Papers* or the constitutional debates. As plaintiff's own research shows, there was much discussion of whether the states or the Congress itself should establish the level of congressional compensation. Various formulas were suggested, including fixing the amount in the Constitution itself, having it fluctuate depending on the average market value of a bushel of wheat, or determined by a special jury panel. None of this discussion, however, throws any significant light on the meaning of the word "ascertain." The most these historical sources reflect is that the Founding Fathers felt that the Congress should have ultimate responsibility for determining by law what the compensation of its own members should be, as opposed to the suggestion that this final responsibility be delegated to others. It was the eventually accepted view that if Congress acted irresponsibly in setting salaries, members would be held responsible by the voters. Congress has retained this ultimate responsibility and indeed has asserted it on more than one occasion.

Congress continues to be responsible to the public for the level of pay its members receive. There is no conceal-

ment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment phase. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which plaintiff seeks.

Repeatedly during the discussions preceding its adoption, our founders sought to preserve in the Constitution a flexible approach to government that would facilitate accommodation to changing conditions and experience. The Constitution is not to be parsed in the narrow, rigid, pedantic manner of a statute. It must remain flexible and adaptable, placing reliance upon the checks-and-balances built into our tripartite format and the sound attitude of voters expected at the polls. The "necessary and proper" clause of Section 7 of the same Article is but one expression of this sound approach. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819).

The Salary Act and the Adjustment Act fix congressional compensation by law and these statutes are not prohibited by Article I, Section 6. Neither of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution. Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed.

So Ordered.

/s/ illegible
United States Circuit Judge
/s/ illegible
United States District Judge
/s/ illegible
United States District Judge

October 12, 1976

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption Omitted in Printing)

(Filed May 7, 1976)

Complaint for Declaratory and Injunctive Relief

Jurisdiction

1. This action seeks a declaratory judgment that provisions of the Federal Salary Act of 1967 and of the Executive Salary Cost-of-Living Adjustment Act which set forth procedures to establish new rates of compensation for Members of Congress are void in that they are violative of Article I, Section 1, and Article I, Section 6, Clause 1 of the Constitution of the United States. This action also seeks a permanent injunction to prohibit defendants, who are Secretary of the Treasury, Secretary of the United States Senate and Sergeant-at-Arms of the United States House of Representatives, from requisitioning, authorizing payment of or disbursing increases in congressional salaries effected pursuant to the Federal Salary Act of 1967 or the Executive Salary Cost-of-Living Adjustment Act.

2. This action arises under Article I, Section 1, and Article I, Section 6, Clause 1 of the Constitution of the United States, under Section 225(f)(A) of the Federal Salary Act of 1967, 2 U.S.C. § 356(A) (Pub.L. 90-206, Title II; 81 Stat. 642) and under Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act, 2 U.S.C. § 31, as amended (Pub.L. 94-82, Title II; 89 Stat. 419), as hereinafter more fully appears. Jurisdiction is conferred on this court by 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202. Venue is properly laid in this Court pursuant to 28 U.S.C.

§ 1391(e). There exists between the parties an actual controversy, justiciable in character, in respect of which plaintiff requests a declaration of his rights by this Court. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

PARTIES

3. Plaintiff Larry Pressler is a citizen of the United States and a taxpayer of the United States. Plaintiff is also a Member of the House of Representatives from the First Congressional District of the State of South Dakota.

4. Defendant William E. Simon is an officer of the United States. He is sued in his official capacity as Secretary of the Treasury of the United States, with official residence in Washington, D.C. It is his duty, pursuant to 31 U.S.C. § 1002, to issue warrants authorizing the payment of monies out of the Treasury of the United States.

5. Defendant Francis R. Valeo is an officer or employee of the United States. He is sued in his official capacity as Secretary of the United States Senate, with official residence in Washington, D.C. It is his duty, pursuant to 2 U.S.C. § 64, to requisition monies for the payment of congressional salaries and to disburse such salaries to the Members of the United States Senate.

6. Defendant Kenneth R. Harding is an officer or employee of the United States. He is sued in his official capacity as Sergeant-at-Arms of the United States House of Representatives, with official residence in Washington, D.C. It is his duty, pursuant to 2 U.S.C. §§ 78 and 80, to requisition monies for the payment of congressional salaries and to disburse such salaries to the Members of the United States House of Representatives.

THREE-JUDGE COURT

7. As appears more fully in the Application for Three-Judge Court and the supporting Memorandum of Points and Authorities submitted herewith pursuant to Local Rule 1-11, this is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2282 inasmuch as plaintiff seeks an injunction to restrain the enforcement, operation and execution of 2 U.S.C. § 356(A) and 2 U.S.C. § 31, as amended, on the ground that such statutory provisions are violative of Article I, Section 1 and Article I, Section 6, Clause 1 of the Constitution of the United States.

COUNT I

8. Plaintiff repeats and realleges each of the allegations contained in paragraph 1 through 7 above.

9. The Federal Salary Act of 1967 became law December 16, 1967 (the "1967 Act"). Pub.L. 90-206, Title II; 2 U.S.C. §§ 351-361. The 1967 Act established a Commission on Executive, Legislative and Judicial Salaries (the "Commission"). The Commission is required to make recommendations to the President, at four-year intervals, on the rates of pay for Senators, Representatives, Federal judges, cabinet officers and other agency heads, and certain other officials in the executive, legislative and judicial branches. The law requires that the President, in the budget next submitted by him after receipt of a report of the Commission, set forth his recommendations with respect to the exact rates of pay he deems advisable for those offices and positions covered by the 1967 Act. The President's recommendations become effective 30 days following transmittal of the budget, unless in the meantime other rates have been enacted by law or at least one House of Congress has enacted legislation which specifically disapproves of all or part of the recommend-

tions. A copy of the 1967 Act is attached hereto as Exhibit A.

10. The first Commission was appointed in July, 1968 and made its recommendations to the President in December, 1968. The President's pay recommendations took effect in March, 1969, and congressional salaries were increased from $30,000 to $42,500 per annum. The United States, through the Secretary of the Treasury, the Secretary of the United States Senate, and the Sergeant-at-Arms of the House of Representatives authorized the payment of increases in congressional compensation and disbursed said increases to Members of Congress.

11. The second Commission was appointed in December, 1972, too late to report to the President by January 1, 1973. As a result, the President's pay recommendations based on the second Commission's report were submitted to Congress on February 4, 1974. The Committee on Post Office and Civil Service reported a resolution (S.Res. 293) on February 28, 1974, which would have permitted all provisions of the President's proposal to take effect, except those providing adjustments in the pay of Members of Congress. The Senate, however, amended the Resolution to disapprove all of the President's recommendations and rejected the entire proposal on March 6, 1974.

12. According to the statutory scheme, the next Commission is scheduled to be appointed in 1976 and to report its recommendations to the President no later than January 1, 1977.

13. Insofar as they provide a mechanism for adjusting salaries of Members of Congress, the foregoing procedures authorized by the 1967 Act are repugnant to Article I, Section 1 and Article I, Section 6, Clause 1 of the Constitution of the United States. Article I, Section 1 provides that "[a]ll Legislative Powers herein granted shall be vested in a Congress of the United States." Article I, Section 6, Clause 1 provides that "[t]he Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." Properly interpreted in light of the intentions of the draftsmen of the Constitution, those constitutional provisions require that congressional salaries be determined by the legislative branch by specific enactment in each instance. Under the 1967 Act, however, congressional salaries are ascertained by Presidential recommendation.

14. The acts of defendants in disbursing the increased salary to Members of Congress have injured and will continue to injure the plaintiff as a United States citizen in that they deprive him of his right as a citizen to have Members of Congress accountable for increases authorized in their compensation.

15. The acts of the defendants have injured and will continue to injure the plaintiff as a United States taxpayer in that they deprive him of his right as a taxpayer to have tax monies received by the Federal Government expended pursuant to laws enacted in accordance with the Constitution of the United States.

16. The acts of the defendants have injured and will continue to injure the plaintiff as a Member of the United States House of Representatives by interfering with the performance of his constitutional responsibilities and congressional duties and by depriving him of his constitutional right to vote on each adjustment proposed in congressional salaries.

17. Unless defendants are enjoined by this Court from requisitioning, authorizing the payment of increases, and disbursing the increases in congressional salaries, defendants will disburse increased congressional salaries adjusted in contravention of constitutional requirements, violating the rights of plaintiff described herein and working

upon plaintiff an unusual hardship or an irreparable injury and damage for which there exists no adequate remedy at law.

COUNT II

18. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 7 above.

19. The Executive Salary-Cost-of-Living Adjustment Act became law August 9, 1975 (the "1975 Act"). Pub.L. 94-82. The 1975 Act provides for an automatic annual cost-of-living adjustment in the salaries of certain executive, legislative and judicial officers and employees of the United States, including Members of Congress. Section 204(a) of the 1975 Act amended 2 U.S.C. § 31, the statutory provision relating to compensation for Members of Congress, to provide that the annual rate of pay for Members of Congress would be the rate established pursuant to Presidential recommendation under the 1967 Act, as annually and automatically increased by a cost-of-living adjustment. Such automatic annual cost-of-living adjustment in all of the salaries covered by the 1975 Act, including the salaries of Members of Congress, is equal in amount to the overall percentage of increase made in the rates of pay of federal employees covered by the General Schedule, which increase is made pursuant to Presidential recommendation authorized by 5 U.S.C. § 5305. The adjustment in salaries covered by the 1975 Act becomes effective at the beginning of the first pay period starting on or after the first day of the month in which the adjustment in General Schedule salaries under 5 U.S.C. § 5305 takes place. A copy of the 1975 Act is attached hereto as Exhibit B.

20. On October 6, 1975, Executive Order No. 11883, 40 F.R. 47091, ordered that the General Schedule salaries be adjusted and that the salaries covered by the 1975 Act be adjusted accordingly. As a result, salaries of Members of

Congress were increased from $42,500 to $44,600 per annum. A copy of Executive Order No. 11883 is attached hereto as Exhibit C.

21. Pursuant to the provisions of said Executive Order, the United States, through the Secretary of the Treasury, the Secretary of the United States Senate, and the Sergeant-at-Arms of the House of Representatives authorized the payment of increases in the congressional compensation and disbursed said increases to the Members of Congress.

22. Insofar as they provide a mechanism for adjusting the salaries of Members of Congress, the foregoing procedures authorized by the 1975 Act are repugnant to Article I, Section 1 and Article I, Section 6, Clause 1 of the Constitution of the United States. Article I, Section 1 provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Article I, Section 6, Clause 1 provides that "[t]he Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." Properly interpreted in light of the intentions of the draftsmen of the Constitution, those constitutional provisions require that congressional salaries be determined by the legislative branch by specific enactment in each instance. Under the 1975 Act, however, Congressional salaries are automatically increased in an amount based upon Presidential recommendations with respect to General Schedule salaries.

23. The acts of defendants in disbursing the increased salary to Members of Congress have injured and will continue to injure plaintiff as a United States citizen in that they deprive him of his right as a citizen to have Members of Congress accountable for increases authorized in their compensation.

24. The acts of the defendants have injured and will continue to injure the plaintiff as a United States taxpayer

in that they deprive him of his right as a taxpayer to have tax monies received by the Federal Government expended pursuant to laws enacted in accordance with the Constitution of the United States.

25. The acts of the defendants have injured and will continue to injure the plaintiff as a Member of the United States House of Representatives by interfering with the performance of his constitutional responsibilities and congressional duties and by depriving him of his constitutional right to vote on each adjustment proposed in congressional salaries.

26. Unless defendants are enjoined by this Court from requisitioning, authorizing the payment of increases, and disbursing the increases in congressional salaries, defendants will disburse increased congressional salaries adjusted in contravention of constitutional requirements, violating the rights of plaintiff described herein and working upon plaintiff an unusual hardship or an irreparable injury and damage for which there exists no adequate remedy at law.

WHEREFORE, plaintiff prays:

1. That plaintiff have a judgment and decree of this Court declaring his rights and status, and more particularly adjudicating:

(a) That the 1967 Act is void and unconstitutional insofar as it establishes procedures for adjusting congressional rates of pay and salaries; and

(b) That the 1975 Act is void and unconstitutional insofar as it establishes procedures for adjusting congressional rates of pay and salaries.

2. That this Court issue a permanent injunction restraining defendants, and each of them and their agents, servants, employees and attorneys, and all persons in active concert or participation with them, from requisitioning,

authorizing the payment of, or disbursing any future increases in congressional salaries effected pursuant to the 1967 Act or the 1975 Act.

3. That this Court accord *de facto* validity to the past acts of defendants, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, in requisitioning, authorizing the payment of, and disbursing past increases in congressional salaries effected pursuant to the 1967 Act and the 1975 Act.

4. That this Court stay, for such period as the Court believes reasonably adequate for Congress, if it so desires, to further ascertain congressional salaries "by Law", the Court's judgment insofar as it affects the authority of defendants to requisition, authorize the payment of, and disburse congressional salaries at the current rate of pay, in order to afford Congress an opportunity to ascertain congresional salaries "by Law", in accord with the requirements of the Constitution of the United States.

5. That this Court grant plaintiff such other and further relief as may be just and proper.

/s/ LARRY PRESSLER
LARRY PRESSLER, PRO SE

Dated: May 7, 1976

APPENDIX D

(Caption Omitted in Printing)

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that the plaintiff aboved named hereby appeals to the Supreme Court of the United States from the final judgment of the United States District Court for the District of Columbia, sitting as a three-judge district court pursuant to 28 U.S.C. § 2284, denying plaintiff's motion for summary judgment and dismissing the complaint entered in this action on October 12, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all necessary items to effect the appeal.

III. The following questions are presented by this appeal:

1. Whether those sections of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.* violate Article I, Sections 1 and 6 of the United States Constitution, both on its face and as applied.

2. Whether the section of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C.

§ 31, violates Article I, Sections 1 and 6 of the United States Constitution, both on its face and as applied.

/s/ Larry Pressler
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Telephone: 202-452-8787

(Certificate of Service Omitted in Printing)

October 22, 1976

APPENDIX E

SUPREME COURT OF THE UNITED STATES

LARRY PRESSLER, MEMBER, UNITED STATES HOUSE OF REPRESENTATIVES *v.* W. M. BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 76-1005. Decided May 16, 1977

PER CURIAM.

The motion of We the People for leave to file a brief, as *amicus curiae*, is granted. The motion of James W. Jeffords, et al., for leave to file a brief, as *amici curiae*, is granted.

Appellant challenges the operation of certain provisions of the Postal Revenue and Federal Salary Act of 1967, 2 U. S. C. §§ 351–361, and of the 1975 Executive Salary Cost-of-Living Adjustment Act, 2 U. S. C. (Supp. 1975) § 31, relating to increases in salaries paid members of Congress. He asserts that the operation of these Acts violates Art. I, § 1, and § 6, cl. 1 (the Ascertainment Clause), of the Constitution.

On April 4, 1977, Congress passed an amendment to the Postal Revenue and Federal Salary Act. On April 12, the President signed that amendment into law. Pub. L. 95–19.

It appearing that the amendment to the Postal Revenue and Federal Salary Act will alter materially the scope and perhaps the nature of appellant's suit, the judgment of the District Court is vacated and the case is remanded to that court for further consideration in the light of the new legislation.

MR. JUSTICE STEVENS would affirm the judgment dismissing the complaint.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-782

LARRY PRESSLER, Member, United States House of Representatives, *Plaintiff*,

v.

W. M. BLUMENTHAL, Secretary of the Treasury;
J. S. KIMMITT, Secretary of the United States Senate;
KENNETH R. HARDING, Sergeant-at-Arms of the United States House of Representatives, *Defendants*.

Order

It appearing that the Supreme Court of the United States has vacated the judgment heretofore entered by this Three-Judge Court and remanded for further consideration in the light of new legislation enacted by Congress on April 4, 1977, amending the Postal Revenue and Federal Salary Act, and it further appearing that the Mandate from the Supreme Court has this day been received, now therefore

This Court directs that on or before July 7, 1977, each party shall file with the Clerk of Court and serve on the other side a written statement suggesting what further proceedings, if any, are required in this matter.

/s/ GERHARD A. GESELL, U.S.D.J.
For the Three-Judge Court

June 15, 1977.

APPENDIX G

(CAPTION OMITTED IN PRINTING)

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that, on this 2nd day of August, 1977, the plaintiff above-named appeals to the Supreme Court of the United States from the final judgment of the United States District Court for the District of Columbia, sitting as a three-judge district court pursuant to 28 U.S.C. § 2284, denying plaintiff's motion for summary judgment and dismissing the complaint entered in this action on July 19, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all necessary items to effect the appeal.

III. The following questions are presented by this appeal:

1. Whether those sections of the Postal Revenue and Salary Act of 1967, (Salary Act), Pub. L. No. 90-206, 81 Stat. 642, 2 U.S.C. §§ 351 *et seq.*, violate Article I, Sections 1 and 6 of the United States Constitution, both on their face and as applied.

2. Whether the section of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, 89 Stat. 421, 2 U.S.C. § 31, violates Article I, Sections 1 and 6 of the United States Constitution, both on its face and as applied.

IV. Background of this case:

1. This action was first brought by plaintiff in the United States District Court for the District of

Columbia on May 7, 1976. Pursuant to 28 U.S.C. §§ 2282 (Repealed by Pu. L. 94-381, § 2, Aug. 12, 1976, 90 Stat. 1119) and 2284, a three-judge District Court was convened, which heard plaintiff's claim on cross motions for summary judgment and defendants' motion to dismiss.

2. A Memorandum Opinion and Order was filed by the Court on October 12, 1976, sustaining the constitutionality of the statutes in question. Plaintiff filed a timely Notice of Appeal to the Supreme Court of the United States, having jurisdiction under 28 U.S.C. § 1253. Plaintiff's appeal was docketed, after a time extension had been granted, on January 20, 1977, with eighteen of plaintiff's colleagues in Congress supporting his case with an *amici curiae* brief.

3. On May 16, 1977, the Supreme Court of the United States vacated the judgment of the United States District Court and remanded the case to that Court for further consideration in light of an amendment to the Salary Act passed by Congress on April 4, 1977, and signed into law by the President on April 12, 1977. Pub. L. 95-19, 2 U.S.C. § 359 (1) (Bartlett Amendment).

4. Pursuant to this remand, the United States District Court for the District of Columbia, on June 15, 1977, directed all parties to file, by July 7, 1977, a statement suggesting what further proceedings, if any, are necessary in this matter.

5. On July 7, 1977, plaintiff filed a written statement with the Clerk of the District Court arguing that the Bartlett Amendment to the Salary Act has no bearing whatsoever upon this case.

6. In its Order of July 19, 1977, the three-judge United States District Court ruled in favor of

plaintiff's arguments that the Bartlett Amendment to the Salary Act does not affect the claims stated by his case.

7. The July 19, 1977 District Court order also reinstates the original United States District Court Memorandum Opinion and Order of October 12, 1976, and remarks that plaintiff's renewed motion for summary judgment, therefore, requires to action.

8. Notice of Appeal to the Supreme Court of the United States from this July 19 Order of the United States District Court is hereby given on this 2nd day of August, 1977.

Respectfully submitted,

/s/ Larry Pressler
LARRY PRESSLER, M.C.
Pro se
1132 Longworth House Office Bldg.
Washington, D.C. 20515
Telephone 202/225-2801

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

APPENDIX H

Federal Salary Act of 1967
P.L. 90-206, (81 Stat. 642)

2 U.S.C. §§ 351-361

§ 351. Establishment of Commission.

There is hereby established a Commission to be known as the Commission on Executive, Legislative, and Judicial Salaries (hereinafter referred to as the "Commission").

• • • • • • • • • •

§ 352. Membership of Commission; appointment; Chairman; term of office; vacancies; compensation; expenses; allowances.

(1) The Commission shall be composed of nine members who shall be appointed from private life, as follows:

(A) three appointed by the President of the United States, one of whom shall be designated as Chairman by the President;

(B) two appointed by the President of the Senate;

(C) two appointed by the Speaker of the House of Representatives; and

(D) two appointed by the Chief Justice of the United States.

(2) The terms of office of persons first appointed as members of the Commission shall be for the period of the 1969 fiscal year of the Federal Government, except that, if any appointment to membership on the Commission is made after the beginning and before the close of such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year.

(3) After the close of the 1969 fiscal year of the Federal Government, persons shall be appointed as members of the Commission with respect to every fourth fiscal year following the 1969 fiscal year. The terms of office of persons so appointed shall be for the period of the fiscal year with respect to which the appointment is made, except that,

if any appointment is made after the beginning and before the close of any such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year.

(4) A vac ncy in the membership of the Commission shall be filled in the manner in which the original appointment was made.

(5) Each member of the Commission shall be paid at the rate of $100 for each day such member is engaged upon the work of the Commission and shall be allowed travel expenses, including a per diem allowance, in accordance with section 5703(b) of Title 5, when engaged in the performance of services for the Commission.

• • • • • • • • • •

§ 353. Executive Director; additional personnel; detail of personnel of other agencies.

(1) Without regard to the provisions of Title 5 governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates, and on a temporary basis for periods covering all or part of any fiscal year referred to in section 352 (2) and (3) of this title—

(A) the Commission is authorized to appoint an Executive Director and fix his basic pay at the rate provided for level V of the Executive Schedule by section 5316 of Title 5; and

(B) with the approval of the Commission, the Executive Director is authorized to appoint and fix the basic pay (at respective rates not in excess of the maximum rate of the General Schedule in section 5332 of Title 5) of such additional personnel as may be necessary to carry out the function of the Commission.

(2) Upon the request of the Commission, the head of any department, agency, or establishment of any branch of the Federal Government is authorized to detail, on a reimbursable basis, for periods covering all or part of any fiscal year referred to in section 352 (2) and (3) of this title, any of the personnel of such department, agency, or establishment to assist the Commission in carrying out its function.

• • • • • • • • • •

§ 354. Use of United States mails by Commission.

The Commission may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States.

• • • • • • • • • •

§ 355. Administrative support services.

The Administrator of General Services shall provide administrative support services for the Commission on a reimbursable basis.

• • • • • • • • • •

§ 356. Functions of Commission.

The Commission shall conduct, in each of the respective fiscal years referred to in section 352 (2) and (3) of this title, a review of the rates of pay of—

(A) Senators, Members of the House of Representatives, and the Resident Commissioner from Puerto Rico;

(B) offices and positions in the legislative branch referred to in sections 136a and 136a-1 of this title, sections 42a and 51a of Title 31, sections 162a and 162b of Title 40, and section 39a of Title 44;

(C) justices, judges, and other personnel in the judicial branch referred to in sections 402(d) and 403 of the Federal Judicial Salary Act of 1964;

(D) offices and positions under the Executive Schedule in subchapter II of chapter 53 of Title 5; and

(E) the Governors of the Board of Governors of the United States Postal Service appointed under section 202 of Title 39.

Such review by the Commission shall be made for the purpose of determining and providing—

(i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and

(ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to the provisions of chapter 51 and subchapter III of chapter 53 of the Title 5, relating to classification and General Schedule pay rates.

• • • • • • • • • •

§ 357. Report to the President.

The Commission shall submit to the President a report of the results of each review conducted by the Commission of the offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title, together with its recommendations. Each such report shall be submitted on such date as the President may designate but not later than January 1 next following the close of the fiscal year in which the review is conducted by the Commission.

• • • • • • • • • •

§ 358. Recommendations of the President to Congress.

The President shall include, in the budget next transmitted by him to the Congress after the date of the submission of the report and recommendations of the Commission under section 357 of this title, his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title. As used in this section, the term "budget" means the budget referred to in section 11 of Title 31.

• • • • • • • • • •

§ 359. Same; effective date.

(1) Except as provided in paragraph (2) of this section, all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or

(C) both.

(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a date later than the date on which such recommendations otherwise are to take effect.

• • • • • • • • • •

§ 360. Same; effect on existing law and prior recommendations.

The recommendations of the President transmitted to the Congress immediately following a review conducted by the

Commission in one of the fiscal years referred to in section 352 (2) and (3) of this title shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent incosistent therewith—

(A) all provisions of law enacted prior to the effective date o· dates of all or part (as the case may be) of such recommendations (other than any provision of law enacted in the period specified in paragraph (1) of section 359 of this title with respect to such recommendations), and

(B) any prior recommendations of the President which take effect under this chapter.

• • • • • • • • • •

§ 361. Publication of recommendations.

The recommendations of the President which take effect shall be printed in the Statutes at Large in the same volume as public laws and shall be printed in the Federal Register and included in the Code of Federal Regulations.

• • • • • • • • • •

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-450

LARRY PRESSLER,
Member, House of Representatives, *Appellant*,

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury;

J. S. KIMMITT,
Secretary of the United States Senate;

KENNETH R. HARDING,
Sergeant-at-Arms of the United
States House of Representatives, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

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On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

Appellee J. S. Kimmitt, Secretary of the United States Senate, respectfully moves this Court to dismiss the appeal, or in the alternative, to affirm the judgment of the United States District Court for the District of Columbia. Sup. Ct. R. 16(1)(c) and (d).

OPINION BELOW

The order of the three-judge district court from which this appeal is taken is reproduced in the Jurisdictional Statement Appendix ("J.S. App.") at 1a-2a. It is not yet reported. The order appealed from reinstated a prior memorandum opinion and order by the three-judge court (J.S. App. 3a-10a) which is reported *sub nom. Pressler* v. *Simon, et al.*, 428 F.Supp. 302 (D.D.C. 1976).

JURISDICTION

The judgment of the three-judge district court reinstating its prior opinion and order was entered on July 19, 1977, following a remand of this case to the district court by this Court on May 16, 1977 for further consideration in the light of new legislation (J.S. App. 22a). A notice of appeal to this Court from the July 19, 1977 order (J.S. App. 24a-26a) was filed on August 2, 1977. The jurisdictional statement was filed on September 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether the appellant, in his capacity as a Member of Congress, has standing to challenge the constitutionality of the procedures established in the Federal Salary Act of 1967 and in the Executive Salary Cost-of-Living Adjustment Act of 1975 for ascertaining the compensation to be received by Senators and Representatives.

2. Whether, even if appellant has standing as a Member of Congress. his challenge to the statutory procedures selected by Congress for determining congressional compensation pursuant to Article I, Sections 1,

6, and 8 should be treated as a nonjusticiable political question that has been committed by the Constitution to the Congress.

3. Whether statutory procedures which were established by Congress in the Federal Salary Act of 1967 and the Executive Salary Cost-of-Living Act of 1975 as the method for ascertaining compensation for Senators and Representatives, and which preserve the right of either House of Congress to reject pay adjustment recommendations submitted by the President are constitutionally permissible as an exercise of Congress' discretion under the "necessary and proper" clause, Article I, Section 8 for carrying into execution the power vested in it by Article I, Section 6 to ascertain by law the compensation of Senators and Representatives.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1 of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6 of the Constitution provides, in pertinent part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.

Article I, Section 8 of the Constitution provides, in pertinent part, that:

The Congress shall have power . . .

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all others Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Federal Salary Act of 1967 (the "Salary Act") is Title II of the Postal Revenue and Salary Act of 1967. Section 225 of the Salary Act, 2 U.S.C. §§ 351-361, is set forth at J.S. App. 27a-32a and the amendment to section 225(i), 2 U.S.C. § 359(1) (the "Bartlett Amendment"), is set forth in the jurisdictional statement ("J.S.") at J.S. 5. The Bartlett Amendment was adopted on April 4, 1977, subsequent to the original decision of the three-judge court in this case on October 12, 1976. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 (the "Adjustment Act"), 2 U.S.C. § 31, is set forth in pertinent part at J.S. 5-6.

STATEMENT

The appellant, in his capacity as a citizen, taxpayer, and Member of the House of Representatives (*see* J.S. App. 12a), challenges in this action the constitutionality of the provisions in the Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. §§ 351-361 ("Salary Act"), and Sections 2 and 3 of the Executive Salary Cost-of-Living Adjustment Act of 1975, 89 Stat. 421, 2 U.S.C. § 31 ("Adjustment Act"), which establish the procedures for ascertaining adjustments in the compensation of Members of Congress. He asserts that these statutes violate Article I, Sections 1 and 6 of the Constitution.

The Salary Act

The first of these statutes, the Salary Act, established a Commission on Executive, Legislative, and Judicial

Salaries ("The Commission") which is appointed every fourth fiscal year and directed (a) to conduct a review of the rates of pay of Members of Congress, federal judges, and higher level positions in the executive, legislative, and judicial branches and (b) to submit to the President a report of such review together with its recommendations as to salaries for such positions. The Salary Act expressly provides that the review by the Commission is to be made to determine (i) the appropriate pay levels and relationships between and among the respective congressional, judicial and executive positions covered by the statute, and (ii) the appropriate pay relationships between such offices and positions and the offices and positions covered by the General Schedule pay rates (2 U.S.C. § 356, J.S. App. 29a-30a).

After the President receives the report and recommendations of the Commission, he is required to include in the next budget transmitted by him to Congress his recommendations with respect to the exact rates of pay he deems advisable for those offices and positions (2 U.S.C. § 357, J.S. App. 30a). These recommendations are then subject to review by both Houses of Congress and all or part of the recommendations for any pay adjustments can be specifically disapproved by either House. To the extent that neither House disapproves the recommended rates of pay, the statute provided prior to the Bartlett Amendment that they became the effective rates of pay at the beginning of the first pay period which began 30 days after the recommendations were submitted to Congress, unless Congress superseded the effectiveness of such rates of pay by adopting a statute providing for different rates of pay (2 U.S.C. § 359, J.S. App. 31a).

The amendment to Section 225(i) of the Salary Act, known as the Bartlett Amendment, provides the express procedure by which each House must act upon the President's recommendations for changes in rates of pay. Under that procedure, each House is required to conduct a separate vote on each of the President's recommendations within 60 calendar days of the submission of those recommendations to Congress, and by such vote approve or disapprove each recommendation. The votes are required to be recorded so as to reflect the vote of each individual Member. Only if both Houses approve by majority vote the President's recommendations for changes in the rates of pay do such recommendations become effective (2 U.S.C. § 359(1), J.S. 5). Thus, both before and after the Bartlett Amendment, either House could reject all or any particular changes in the pay rates recommended by the President and leave the existing rates of pay in effect.

The first quadrennial pay adjustment under the Salary Act increasing the salaries of Members of Congress, judges and higher level executive, judicial and legislative branch positions became effective February 15, 1969. *See* 34 Fed. Reg. 2241 (1969). The recommendation for the second quadrennial pay adjustment was disapproved by the Senate on March 6, 1974. S. Res. 293, 93rd Cong., 2d Sess., 120 CONG. REC. 5492 (1974). The recommendations for pay increases under the third quadrennial adjustment became effective February 17, 1977. *See* 42 Fed. Reg. 10297 (1977). Shortly thereafter, on April 4, 1977, the Bartlett Amendment establishing the express procedure for congressional action on Presidential pay adjustment recommendations was adopted. (Pub. L. No. 95-19, 91 Stat. 45). The only increase in congressional pay under the Salary Act which took place while appellant has

been a Member of Congress [1] was the third quadrennial adjustment.

The Adjustment Act

In order to keep the pay adjustments covered by the quadrennial adjustment plan of the Salary Act from lagging behind the pay of federal employees covered by the General Schedule, Congress, in 1975, also enacted the Adjustment Act (J.S. 5-6) to provide a statutory procedure for an automatic annual cost-of-living adjustment in salaries of Members of Congress, federal judges, and higher level executive, judicial, and legislative officials equal to the average percentage increase made each year in the rates of pay of federal employees covered by the General Schedule under the provisions of the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 5 U.S.C. §§ 5305-5312. If the President considers it inappropriate because of national emergency or economic conditions to make the pay adjustments mandated by the Adjustment Act, he is directed by the statute to prepare and transmit to Congress a plan of alternative recommendations. If the President's alternative plan is rejected by either House of Congress, the statute requires that the mandatory increase automatically becomes effective.

The Adjustment Act was adopted over appellant's dissenting vote in 1975. (121 CONG. REC. 25841 (1975)). The mandatory salary increases provided by that Act became effective automatically in 1975 and 1976, the President having submitted no alternative plans for consideration by Congress. Congress, however, declined to appropriate funds to pay the 1976 increase. Con-

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[1] Appellant became a Member of the House of Representatives January 3, 1975.

gress also, by Pub. L. No. 95-66, 91 Stat. 270, enacted July 11, 1977, specifically provided that there would be no annual pay adjustment in 1977 under that Act. Appellant voted against the payment of the automatic increases in both instances in recorded votes. (122 CONG. REC. H9394-5 (daily ed. Sept. 1, 1976), and 123 CONG. REC. H6592 (daily ed. June 28, 1977), respectively).

The Proceedings Below

Appellant asserts that insofar as the Salary Act and the Adjustment Act establish procedures for changes in congressional pay they are repugnant to Article I, Section 6 of the Constitution which requires the compensation of Senators and Representatives ". . . to be ascertained by law" and to Article I, Section 1 of the Constitution which provides that all legislative powers ". . . shall be vested in the Congress of the United States which shall consist of a Senate and House of Representatives." (Complaint, ¶¶ 13 and 22; J.S. App. 14a and 17a). He claims that the defendants have injured him as a citizen by depriving him of the right to have Members of Congress accountable for increases authorized in their compensation (Complaint ¶¶ 14, 23); that they have injured him as a taxpayer by depriving him of the right to have tax monies expended pursuant to laws (Complaint ¶¶ 15, 24); and that they have injured him as a Member of the House of Representatives by interfering with the performance of his constitutional responsibilities and congressional duties and by depriving him of his right to vote on each salary adjustment (Complaint ¶¶ 16, 25).

A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282 and 2284. Appellant moved for summary judgment and appellees filed cross motions

for summary judgment and a motion to dismiss the appellant's complaint. The three-judge district court in a memorandum opinion and order (J.S. App. 3a-10a) rejected appellant's claim of citizen and taxpayer standing, granted his claim of standing as a Member of Congress, sustained the constitutionality of the statutes in question, granted summary judgment to appellees, and dismissed the complaint (J.S. 3).

In its opinion, the three-judge district court concluded that while appellant's theory of injury "is somewhat unclear" (J.S. App. 7a), he was not injured as a Member of Congress by the challenged procedure when a proposed salary increase under the Salary Act was rejected because the status quo was unaltered. However, the court concluded, he was injured as a Member of Congress by the October 1975 automatic salary increase under the Adjustment Act procedure because it required the same percentage increase in pay for the positions covered by that Act as for positions covered by the General Schedule without further vote by either House. And since the Adjustment Act increases on a percentage basis the compensation determined under the Salary Act, the court concluded that appellant, therefore, had standing to challenge both Acts.

On the merits of the case, the three-judge court held that in enacting the Salary Act and the Adjustment Act, Congress had established its compensation "by law" within the requirements of Article I, Section 6 of the Constitution and that the statutory schemes selected by the Congress in such statutes do not contravene the Constitution. The court noted that when the President submits recommendations, either House, acting alone, can by negative vote prevent the recom-

mendations from taking effect and leave in effect the existing compensation levels provided by statute. The court found that "a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment clause" and that "Congress must always account to the people for what it pays itself." Finally, the court concluded that our constitutional system places reliance on the checks and balances built into our tripartite format and the sound attitude of voters expected at the polls, and that the "necessary and proper" clause "is but one expression of this sound approach." (J.S. App. 10a).

This opinion and order was reinstated by the district court following remand of the case to it by this Court for further consideration in the light of the Bartlett Amendment. The court concluded that amendment did not affect the plaintiff's claims that the 1969 and 1977 Salary Act adjustments and the Adjustment Act procedures are inconsistent with Article I, Section 6, or the court's prior decision that such procedures fixed congressional compensation by law; were not prohibited by Article I, Section 6; and did not contravene the Constitution.

ARGUMENT

I. MOTION TO DISMISS

Appellee Kimmitt hereby moves to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III of the Constitution because (1) the appellant lacks standing to bring this appeal and (2) the appeal presents questions which are political in nature and, therefore, beyond the scope of judicial review. Either the absence of standing or the presence of a political question suf-

fices to prevent the power of the judiciary from being invoked by the complaining party. *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 215 (1974); *Powell* v. *McCormack,* 395 U.S. 486, 516-17 (1969).

A. The Appellant Lacks Standing to Bring This Appeal

While appellant's jurisdictional statement is silent with respect to his standing, this is, nevertheless, a threshold question for consideration by this Court. *Buckley* v. *Valeo,* 424 U.S. 1, 11 (1976); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973).

In his complaint, appellant asserted standing in his capacity as a citizen, as a taxpayer, and as a Member of the House of Representatives. The district court correctly concluded that the appellant lacked standing in his capacity as a citizen and as a taxpayer. *Richardson* v. *Kennedy,* 401 U.S. 901 (1971), *aff'd* 313 F.Supp. 1282 (W.D.Pa. 1970) (a challenge to the Salary Act by a citizen and taxpayer). The injuries which appellant asserts in his complaint as a citizen and as a taxpayer (Complaint ¶¶ 14, 15, 23 and 24) are nothing more than the assertion of a "generalized grievance" common to all or a large class of citizens and taxpayers in substantially equal measure and, thus, not the type of injury required to invoke the jurisdiction of a federal court. *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975); *Flast* v. *Cohen,* 392 U.S. 83, 106 (1968).

The appellant also lacks standing to bring this appeal in his capacity as a Member of Congress. His complaint is that the *defendants* have injured and will continue to injure him as a Member of Congress by interfering with the performance of his constitutional responsibilities and congressional duties and "by de-

priving him of his constitutional right to vote on each adjustment proposed in congressional salaries" (Complaint ¶¶ 16, 25, J.S. App. 15a, 18a). Certainly, neither the Secretary of the Treasury nor the Secretary of the Senate or Sergeant-at-Arms of the House in their capacities as salary disbursing officials, can be said to have interfered with appellant's performance of his constitutional responsibilities and duties or to have deprived him of the right to vote. At best, as reframed by the court below, appellant's complaint is directed against his colleagues who before and after appellant became a Member of Congress adopted the statutory schemes for ascertaining legislative, judicial and executive branch rates of pay without further legislative action being required unless and until superseded by another statute. Thus, appellant claims, in effect, that he has standing, as a Member of Congress, to request that the judicial branch inject itself into the legislative branch decision-making process.

In any event, under these statutory schemes, appellant's rights as a Member of Congress are preserved to him. As a Member of the House of Representatives, appellant was not, and is not, denied the right to introduce legislation which would specifically disapprove of all or part of the President's recommendations under the Salary Act. The Adjustment Act was adopted over appellant's dissenting vote in 1975. Appellant could also always vote against the appropriation of funds to pay the salaries, and in record votes, he voted against the disbursement of monies for the automatic pay increase in 1976 as well as against the automatic pay increase which would otherwise have been placed in effect in 1977. Thus, appellant's constitutional rights as a Member of Congress to introduce legisla-

tion and vote have been preserved to him and in fact exercised by him. His success in exercising those rights, however, has depended upon his ability to attract the support of other Members of Congress for his position. Simply stated, appellant has not been able to persuade his colleagues in all instances that his view should be adopted. Thus, in this action, he is not seeking, as a Member of the House to redress an injury *to* the body of which he is a part, but, instead, to complain about the acts of that body with which he disagrees. Appellant may be frustrated by his lack of ability to prevail, but he was not and is not prevented from performing his legislative duty.

Furthermore, many statutes of a permanent nature could be attacked on the basis of appellant's rationale that his right to vote has been denied because they authorize future actions which can be taken without further legislative approval until Congress amends or repeals the legislation. For example, a continuing authorization or permanent indefinite appropriation [2] deprives a Member of Congress of the right to vote thereafter on such uses of the public monies unless he can persuade his colleagues to change the previously adopted procedure, notwithstanding the requirement

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[2] *See, e.g.*, 31 U.S.C. § 711, which provides in part:

> There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes specified in this section, such sums as may be necessary for the same, respectively; and such appropriations shall be deemed permanent annual appropriations.
>
> • • •
>
> 2. Interest on public debt. For payment of interest on the public debt, under the several Acts authorizing the same.

in Article I, Section 9, that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Appellant's disagreement with a statutory scheme adopted by Congress does not provide him with the requisite standing to challenge the statute in his capacity as a Congressman. *Harrington* v. *Bush,* 553 F.2d 190 (D.C.Cir. 1977); *Harrington* v. *Schlesinger,* 528 F.2d 455 (4th Cir. 1975); *Korioth* v. *Briscoe,* 523 F.2d 1271 (5th Cir. 1975); *Holtzman* v. *Schlesinger,* 484 F.2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). These cases in which the plaintiff was held to have no standing to complain against the legislative acts of his colleagues may be sharply distinguished from *Coleman* v. *Miller,* 307 U.S. 433 (1939), and *Kennedy* v. *Sampson,* 511 F.2d 430 (D.C. Cir. 1974), in which legislators were found to have standing to complain that the effectiveness of their votes had been diminished by illegal interference from *non-legislative* sources.[3]

Furthermore, the fact that Congress in the Salary Act and the Adjustment Act departed from the previously established congressional pattern of dealing *ad hoc* with federal pay adjustments from time to time and provided a mechanism pursuant to which pay rates

[3] In *Coleman,* state legislators were held to have standing to complain that the lieutenant governor, who they asserted was not a part of the legislature for that purpose, had, in violation of the Constitution, cast a tie-breaking vote in the State senate in favor of a measure, thereby denying the effectiveness of the votes of the legislators who had voted against the measure. In *Kennedy,* Senator Kennedy was held to have standing to bring an action for a declaratory judgment that an Act for which he had voted became law notwithstanding the exercise by the President of a legally invalid "pocket veto."

for federal employees are adjusted,[4] neither removed the control over the amount of such salaries from Congress nor provides appellant with requisite personal injury required to establish standing. The amount of such salaries remains subject to congressional control in at least three ways. First, under both the Salary Act and the Adjustment Act the President's recommendations concerning rates of pay can be rejected by either House (J.S. 5, 12). Second, the authorized rates of pay determined pursuant to both statutes also always remain subject to subsequent legislation amending or repealing such procedures or authorizing other methods of determining federal pay levels. And third, federal pay, however ascertained, remains subject to further congressional action appropriating funds therefor.

Under these circumstances, appellant has neither the "personal stake" in the outcome of the controversy nor the requisite injury necessary to meet the requirements of Article III in order to bring this action as a Member of Congress. *See Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

B. The Issue Presented by Appellant Is a Nonjusticiable Political Question

This appeal involves the methods chosen by Congress[5] in the Salary Act and the Adjustment Act to

[4] *See* National Treasury Employees v. Nixon, 492 F.2d 587, 592 (D.C.Cir. 1974) (involving a related statute).

[5] Appellant characterizes the Question Presented as follows:

> Whether *the methods* of determining salary rates for Senators and Representatives under Section 225 of the Postal Revenue and Salary Act of 1967 and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in compensation for members of Congress without a direct vote by either House of Congress. (J.S. 4) (emphasis added).

ascertain congressional compensation. One of the tests to determine if this issue involves a political question is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker* v. *Carr,* 369 U.S. at 217. Both Article I, Section 6 of the Constitution, which provides that "Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law," and Article I, Section 8, which vests in Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" powers vested in Congress and the other powers vested in the Government of the United States, clearly demonstrate that the issue of congressional compensation is committed by the Constitution to Congress itself. The ratification debates cited by the appellant (J.S. 18-19) further confirm the textual commitment of this issue to the legislative branch.

Appellant's own arguments make it apparent that the issue he presents in this appeal is a political question. He argues that Congressional salaries must be fixed by Congress without any legislative involvement by the President (J.S. 22), that the public accountability of Members of Congress through the reelection process is a sufficient check on congressional enactment of excessive salaries (J.S. 20), and that the voters must be able to know how their Senators and Representatives stand on the amount of congressional compensation (J.S. 25). By their very statement such arguments characterize the issue as a political question within the province of the Congress under Article I, Section 1 of the Constitution. Moreover, the Bartlett Amendment which provides for the recording of the votes of each individual Member to approve or disapprove the rec-

ommended rates of compensation submitted by the President also reflects that this issue is a matter to be resolved by the Members of Congress and their constituencies, who ultimately must be satisfied as to the method chosen for ascertaining congressional compensation and its amount.

The language of this Court in *Gilligan* v. *Morgan,* 413 U.S. 1, 10 (1973), is clearly applicable to this situation: "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process." Given the constitutional debates, the ratification debates, and the express language of the Constitution itself, appellant's attack upon the action of Congress in providing by law for the ascertainment of the compensation of Senators and Representatives by the same method that the compensation of judges and higher level executive, legislative and judicial branch compensation is ascertained clearly raises a political question which this Court need not entertain.

II. MOTION TO AFFIRM

Alternatively, appellee Kimmitt moves this Court to affirm the judgment of the three-judge district court. In Part II of its opinion the court below held that the Salary Act and the Adjustment Act "fix congressional compensation by law," that "these statutes are not prohibited by Article I, Section 6," and that "[n]either of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution" (J.S. App. 10a). The court below is correct and should be affirmed.

A. The Challenged Statutes Ascertain Congressional Compensation "By Law" and Are Not Prohibited by Article I, Section 6

The three-judge district court correctly rejected appellant's argument that the Salary Act and the Adjustment Act do not constitute the ascertainment of congressional compensation "by law." The Salary Act and the Adjustment Act are clearly statutes which establish congressional compensation within the meaning of Article I, Section 6, and the court below pointed out that the appellant himself conceded that when Congress passed the Acts governing its compensation, it acted "by law" (J.S. App. 8a).

Appellant's entire argument hinges on a very narrow interpretation of "ascertained"—that it *must* be a specific *dollar* amount. The three-judge court also correctly and unanimously rejected this argument. Article I, Section 8 vests in Congress the power to make all laws which shall be necessary and proper for carrying into execution any of the powers vested in Congress or in the Government of the United States by the Constitution. Article I, Section 6 does not limit the manner or methods which Congress may select as being "necessary and proper" for carrying into execution its power to ascertain congressional compensation, except that it must be "by law."

Furthermore, Madison, in explaining and defending Article I, Section 6 in the Virginia ratification debate quoted by appellant (J.S. 18), expressly suggested the need to provide for the adjustment of congressional salaries to meet "the gradual diminution of the value of all coins and circulating medium" as one reason against ascertaining such salaries "immutably." The need he foresaw was to become the basis for the action by Congress to select methods in the Salary Act and

the Adjustment Act which would provide a means to ascertain the salaries for the positions covered by these Acts so as to preserve the pay relationship between these positions and the other government employees whose pay is determined on a comparability basis with private employment and annually adjusted for the cost of living.

Appellant, furthermore, cites no case to support his argument that "ascertained" means *only* fixed by specific dollar amount. Indeed, the two cases he cites do not even suggest that the provisions in statutes in question are not valid. In *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321 (1937), this Court held that the constitutional requirement that no money could be paid out of the Treasury unless it had been appropriated by an Act of Congress does not require even that the Act of Congress specify with exactitude uses to which the appropriated money is to be put. And *Cain* v. *United States,* 73 F.Supp. 1019, 1021 (N.D.Ill. 1947), which appellant cites as an analogy for his point that a specific statute is required, does not support him because it deals only with the situation in which there was no statute which vested in the courts of law the appointment of inferior officers. Compare *Surowitz* v. *United States,* 80 F.Supp. 716 (S.D.N.Y. 1948), in which there was a statute authorizing the heads of departments to appoint such numbers of employees of the various classes recognized by statute as may be appropriated for the Congress.

Plaintiff's rationale would even jeopardize the action of Congress in appropriating by law such amounts of money from the Treasury "as may be necessary" to pay claims against the Federal Government ascer-

tained by the courts and certified by the Comptroller General. 31 U.S.C. § 724a.

B. The "Necessary and Proper" Clause Vests Discretion in Congress to Select the Means to Execute Its Powers

Since *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), it has been established that the "necessary and proper" clause allows Congress discretion in selecting the means to carry into execution any power the Constitution confers on Congress, so that all means which are appropriate and plainly adopted to that end, and are not prohibited, are constitutional, if the end is legitimate and within the scope of the Constitution. *Id.* at 421. As the court below pointed out, "our founders sought to preserve in the Constitution a flexible approach to government that would facilitate accommodation to changing conditions and experience" (J.S. App. 10a). The selection by Congress of the method established by the Salary Act and the Adjustment Act for ascertaining federal salaries was clearly an attempt based upon the needs of a constantly growing federal government to provide a more orderly and fair manner for determining such salaries. It grew out of dissatisfaction with the inadequacies of the previous method.

Appellant, however, while conceding that the "necessary and proper" clause "allows Congress discretion *vis-a-vis* the means by which the power granted it by the Constitution are to be carried out" (J.S. 20), asserts that "there have been no changes in our society which presage a need for altering the process of setting salary rates for Senators and Representatives" (J.S. 29). Therefore, appellant seeks to have this Court preclude Congress from changing its choice of means or

methods based upon experience with the means or methods previously chosen.

However, to adequately carry into execution the various powers vested in Congress, it cannot be more clear, as this Court said in *United States* v. *Fisher,* 6 U.S. (2 Cranch) 358, 396 (1805), that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." More recently, in *Buckley* v. *Valeo,* 424 U.S. 1, 91 (1976), this Court also pointed out that: "Whether the chosen means appear 'bad,' 'wise,' or 'unworkable' to us is irrelevant; Congress has concluded that the means are 'necessary and proper' to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8."

C. Neither of the Challenged Statutes Contravene the Constitution

The statutes challenged by appellant were enacted by Congress to provide a more regular and fair method of adjusting higher level federal salaries than the *ad hoc* method previously used. The Salary Act provides for a quadrennial review of such salaries by a Commission appointed for that purpose. The review is to include both the pay levels and the relationships between and among the legislative, judicial and executive positions and the positions covered by the General Schedule. The Commission reports its recommendations to the President who, in the next budget he transmits to Congress, submits his own recommendations. Either House of Congress can reject the President's recommendations. The specific procedure for their approval or disapproval by Congress is established by the Bartlett Amendment. Under the Adjustment Act,

specific annual cost-of-living salary adjustments are mandated unless the President submits an alternative plan which either House of Congress can reject. The rejection by Congress of the President's recommendations and proposals has been called the "legislative veto." By using it, Congress retains control, and the right of either House, under the bicameral system, to reject a change in the status quo is preserved.

The arguments advanced by appellant in opposition to the legislative veto provisions in the challenged statutes—(1) that an affirmative Act of Congress is required to ascertain congressional salaries by dollar amount, (2) that the American voters have no record of their Senators' and Representatives' stand on a proposed salary increase, and (3) that the parliamentary procedure is inadequate (J.S. 24-25)—were correctly rejected by the court below when it found that the challenged statutory procedures for ascertaining congressional pay did not contravene the Constitution. First, the Constitution does not prohibit the use of a method for ascertainment by a statutory formula which allows either House to reject a recommendation or proposal to change the status quo. Second, voice votes, rather than record votes, may be taken in either House. And third, no Member of Congress has a constitutional right to have a bill he favors voted on by the House of which he is a Member.

The lower court also correctly found that the Bartlett Amendment had no effect on appellant's claims that pay adjustments under the Salary Act and the Adjustment Act contravene the Constitution. The amendment does, however, significantly dilute the importance of this case by eliminating appellant's major

arguments opposing the Salary Act procedure. So far as the Adjustment Act is concerned, appellant's argument is even weaker because the statutorily mandated salary increases automatically become effective unless the President submits an alternative plan. Only the alternative plan is subject to a legislative veto, and the President has submitted no alternative plans. Thus, the provision in the Adjustment Act for a legislative veto is not even an issue in this case.

Appellant is correct that this case, which involves the ascertainment of congressional pay pursuant to Article I, Section 6, is distinguishable from *Atkins, et al.*, v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *petition for cert. filed,* 46 U.S.L.W. 3055 (U.S. Aug. 8, 1977) (No. 77-214), which asserts a challenge to the legislative veto provision as it applies to the ascertainment of judicial pay rates. This case is also distinguishable in that appellant sues as a citizen, taxpayer and Member of Congress to enjoin increases in compensation under the challenged procedures, while the plaintiffs in *Atkins* attack the rejection of a proposed increase in judicial salaries under the challenged procedure. However, appellant is incorrect in suggesting that this case and *Atkins* necessarily present the legislative veto issue to this Court for decision (J.S. 32). It is not necessary to reach the question of constitutionality of the legislative veto in a claim for a salary increase under the Salary Act, such as *Atkins,* because the claim fails whether or not the legislative veto provision is unconstitutional if the provision is inseverable from the remainder of the pay adjustment scheme. *McCorkle* v. *United States,* 559 F.2d 1258 (4th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3243 (U.S. Sept. 28, 1977) (No. 77-486). Thus, *Atkins* turns on the issue of

severability, and this case turns on the meaning of "ascertained by law."

Therefore, appellant's argument with respect to severability relates only to the impact of a determination by this Court that the challenged procedure is unconstitutional. He argues that the determination of non-congressional salaries is "readily severable" from the ascertainment of congressional salaries (J.S. 31).[6] This claim is clearly not supported by the legislative history or the express language of the statutes. The Salary Act specifically provides that the quadrennial review by the Commission "shall be made for the purpose of determining and providing—

> (i) the appropriate pay levels and relationships *between and among* the respective offices and positions covered by such review [Members of Congress, judges, and higher-level positions in the legislative, judicial, and executive branches] and
>
> (ii) the appropriate pay relationships *between* such offices and positions *and* the offices and positions subject to the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and General Schedule pay rates [other federal employees]", (2 U.S.C. § 356, J.S. App. 30a) (emphasis added).

[6] Appellant does not contend that the legislative veto provisions in the statutes he attacks are severable from the statutory scheme. The argument that the legislative veto provision is severable was expressly considered, however, and rejected by the Fourth Circuit in McCorkle v. United States, 559 F.2d 1258, 1262 (4th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 28, 1977) (No. 77-486). The court said:

> Voiding the one-house veto as unconstitutional while leaving presidential authority intact would increase the President's power over salaries far beyond the intention of Congress. We are satisfied that the legislative history establishes that Congress would not have delegated authority to the President to establish salaries without the provision for the one-house veto. Thus, § 359(1)(B) creating the veto is inseparable from those parts of the statute that empower the President to make potentially binding recommendations.

Therefore, the court held that the plaintiffs in that case could not prevail in their attack on the Salary Act because, if the one house veto provision was unconstitutional, the entire statutory scheme for raising salaries fell and, if the legislative veto provision was constitutional, the plaintiffs had been properly denied the salary increases they sought.

The Adjustment Act also specifically addresses the intention of Congress to treat congressional and non-congressional pay on a comparability basis for the positions covered by the Act. The Senate Report,[7] for example, states:

> Section 204 . . . the pay of the affected Members, officials and employees [of the legislative branch] would be adjusted under the *same* formula used for the Executive Salary Schedule.
>
> Section 205 relates to the salaries in the judicial branch, which also would be adjusted under a formula *identical* to that used for the Executive Salary Schedule (emphasis added).

The legislative intent is express, therefore, that Congress intended the salaries of Members of Congress, judges and higher level executive, legislative and judicial branch officials be determined together as part of a single plan.

The court below was correct, therefore, in holding that the methods chosen by the Congress in the Salary Act and the Adjustment Act ascertained the compensation of Senators and Representatives by law, that these

[7] S.Rep. No. 333, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News 845.

statutes are not prohibited by Article I, Section 6, and that insofar as they govern the ascertainment of congressional compensation, they do not contravene the Constitution.

CONCLUSION

For the reasons stated above, this appeal should be dismissed for lack of justiciability because of appellant's lack of standing and the presence of a political question.

Alternatively, for the reasons expressed in Part II of the opinion below (J.S. App. 8a-10a), the decision below should be affirmed.

Respectfully submitted,

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November 16, 1977

In the

Supreme Court of the United States

October Term, 1977

No. 77-450

LARRY PRESSLER,
Appellant,

vs.

W. M. BLUMENTHAL,
Secretary of the Treasury;

J. S. KIMMITT,
Secretary of the United States Senate;

KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal from the United States District
Court for the District of Columbia

MOTION OF APPELLEE KENNETH R. HARDING TO DISMISS OR AFFIRM

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In the

Supreme Court of the United States

October Term, 1977

No. 77-450

LARRY PRESSLER,
Appellant,

vs.

W. M. BLUMENTHAL,
Secretary of the Treasury;

J. S. KIMMITT,
Secretary of the United States Senate;

KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal from the United States District
Court for the District of Columbia

MOTION OF APPELLEE KENNETH R. HARDING TO DISMISS OR AFFIRM

The appellee Kenneth R. Harding, Sergeant-at-Arms of the United States House of Representatives, respectfully moves this Court to dismiss or affirm the judgment of the United States District Court for the District of Columbia (a three-judge court) entered on July 19, 1977, which judgment reinstated a prior judgment dated October 12, 1976, and reported at 428 F. Supp. 302.

QUESTIONS PRESENTED

1. Whether the appellant, as a sitting Member of the House of Representatives, has standing before this Court to challenge the constitutionality of the procedures established in the Federal Salary Act of 1967 and in the Executive Salary Cost-of-Living Adjustment Act of 1975 for ascertaining the compensation to be received by Senators and Representatives.

2. Whether a constitutional challenge to the method chosen by Congress to ascertain the compensation to be received by Senators and Representatives, pursuant to Article I, Section 6, raises a political and nonjusticiable question that has been textually and totally committed by the Constitution to Congress.

3. Whether, in execution of its power under Article I, Section 6, to ascertain Congressional compensation "by Law," Congress can ascertain such compensation only through enactment of specific legislation, or whether the necessary and proper clause of Article I, Section 8, gives Congress discretion to ascertain such compensation through other legislative modes.

STATEMENT OF THE CASE

The District Court's opinion at 428 F. Supp. 302 (J.S. App. 3a-10a) contains a complete and accurate summary of appellant's contentions and the purported bases therefor. The jurisdictional statement now before the Court is virtually identical, in content and argument, to appellant's jurisdictional statement submitted on the prior appeal to this Court, No. 76-1005. The only new factor discussed by appellant concerns the Bartlett amendment

to §225(i) of the Salary Act (adopted on April 4, 1977), by which the so-called "one-House veto" device was excised from the Act. See J.S.5. It was that amendment that caused this Court, on the earlier appeal, to remand this case to the three-judge District Court to consider what effect the amendment had upon appellant's claims. The District Court found that it had no effect and accordingly reinstated its former judgment and opinion. J.S. App. 1a-2a.

In view of the full statements now and previously before the Court concerning the basic facts and contentions, it suffices to say here that this case involves but one basic overriding claim – an attempt by a sitting Member of the House of Representatives to challenge the wisdom and the votes of his Congressional colleagues in enacting legislation that secures Executive assistance and recommendations in ascertaining what compensation Congressmen should receive in an era of growing costs of living.

MOTION TO DISMISS

The appellee Harding hereby moves to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III of the Constitution. The nonjusticiability of this appeal is obvious from two standpoints: (1) the appellant lacks standing to process this appeal; and (2) the appeal presents only questions that are political in nature and hence beyond the scope of judicial review. As was said in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974), "either the absence of standing or the presence of a political question suffices to prevent the power of the judiciary from being invoked by the complaining party."

(1) **Appellant's lack of standing.** As the District Court held (J.S.App. 6a), appellant lacks standing as a citizen and taxpayer to assert his "generalized grievances" as to the methods of increasing Congressional compensation. *Richardson v. Kennedy*, 401 U.S. 901 (1971), affirming 313 F.Supp. 1282 (W.D. Pa. 1970). It would appear equally true that he lacks standing as a Congressman to assert such grievances.[1] Stripped to essentials, his grievance is simply that he and his colleagues in Congress should be compelled to cast roll call votes on legislation designed to establish Congressional compensation levels rather than to sit silently while adjustments and increases are effectuated automatically or through Presidential recommendations – all pursuant to existing legislation on which roll call votes were taken. In short, appellant is attempting "to interfere with the internal workings of the Congress itself" (J.S.App. 6a), which the District Court conceded would take his case out of the realm of judicial cognizability.

Moreover, no provision of the Constitution mandates that each and every compensation proposal be subjected to roll call votes or to the full legislative process. Nor does any provision of the Salary Act or the Adjustment Act, or the actions of the appellees thereunder, preclude the appellant from introducing and voting on any legislation to change the legislative mode of ascertaining Congres-

[1] The District Court's contrary ruling as to standing is no bar to reconsideration of the matter as a condition to the exercise of this Court's appellate jurisdiction. Standing, like other "case or controversy" elements, "must exist at [all] stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). This Court, in other words, must make an independent evaluation of appellant's standing at this appellate stage of the case.

sional compensation. He remains free to attempt to influence his colleagues to join him in voting to disapprove any salary increase recommended by the President, or to roll back any previously recommended increase. Since all the established parliamentary procedures are totally available, it is difficult to see how any combination of those procedures can impair what the District Court called (J.S. App. 7a) "the efficacy of Mr. Pressler's vote."

Finally, since the appellant complains only about *increases* in Congressional compensation, not about *decreases or failures to approve increases*, it may be doubted whether he has suffered any direct injury sufficient to confer standing. Cf. *Atkins v. United States*, No. 77-214, and *McCorkle v. United States*, No. 77-486, both pending on petitions for certiorari, where federal judges and federal executives complain about compensation increases that were *not* granted them. The fact that appellant has seen fit to donate "substantially all of his share of the disbursement increased ordered under the Acts since his election to Congress to charity" (J.S. 31), while apparently retaining a small share, indicates that he has personally benefited from the actions to which his complaint is directed.[2] This is not the kind of personal injury in fact – from the standpoint of a Congressman – that is the *sine qua non* of standing. See *Warth v. Seldin*, 422 U.S. 490 (1975).

[2] Appellant states that he "requests injunctive relief only in regard to future disbursements of increases in Congressional salaries that have been authorized under the Salary Act of 1967 and the 1975 Adjustment Act" (J.S. 31). He does not seek "retroactive" relief (*id.*). Thus he intends to keep all past salary increments, including those portions that he voluntarily donated to charities.

(2) **The existence of a political question.** As the District Court acknowledged (J.S.App. 6a, n. 2), if this is an attempt to interfere with the internal workings of Congress "this case might present a political question." Indeed, appellant's own analysis (J.S. 17-20) of the Ascertainment Clause, Article I, Section 6, makes plain that the method of ascertaining Congressional compensation "by Law" has always been a matter textually and totally committed by the Constitution to Congress. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). And the fact that Congress was here acting, in adopting the Salary Act and the Adjustment Act, under the Necessary and Proper Clause of Article I, Section 8, to carry into execution its powers under the Ascertainment Clause only augments the political nature of the question presented by appellant (J.S. 4).

In short, the method by which Congress determines or ascertains its own compensation is totally within the discretion of Congress. It involves the internal workings and voting procedures of the Congress itself, matters which no court can or should control. This, then, is a case involving a political question in the classic sense.

MOTION TO AFFIRM

Alternatively, the appellee Harding moves to affirm the judgment of the three-judge District Court. That court, in Part II of its opinion (J.S.App. 8a-10a), was plainly correct in concluding that neither the Salary Act nor the Adjustment Act contravenes the Ascertainment Clause of the Constitution, Article I, Section 6. Both Acts constitute methods of ascertaining "by Law" the compensation to be received by Members of Congress within the meaning of the Ascertainment Clause; and the court below noted that appellant himself has conceded that when Congress

passed these two Acts governing the ascertainment of its compensation, it acted "by Law" (J.S.App. 8a).

Appellant's entire constitutional argument, accurately described by the court below as being "directed to what is essentially a matter of form rather than substance" (J.S.App. 8a), has been thoroughly canvassed, resolved and even reconsidered on the prior remand. The court's conclusion is so eminently correct that a summary affirmance of its reinstated judgment is in order.

It suffices here to reiterate that, as the District Court recognized (J.S.App. 10a), these Acts are an expression of what Congress deemed "necessary and proper" to carry into execution its exclusive powers under the Ascertainment Clause to fix its own compensation. This great reservoir of discretionary power, conferred on Congress by the Necessary and Proper Clause of Article I, Section 8, was not designed – as appellant would have it (J.S. 29) – to confine Congress to its original selection of modes for ascertaining compensation. Nothing in the language or purpose of the Necessary and Proper Clause, or in the Ascertainment Clause for that matter, precludes an alteration in the modes of ascertaining compensation that had been followed for 178 years. The lesson to be drawn from the Necessary and Proper Clause, as interpreted in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), is that the constitutional founders intended to preserve "a flexible approach to government that would facilitate accommodation to changing conditions and experience" (J.S.App. 10a). And since the assistance of the Executive Branch in executing the Congressional function of salary ascertainment is not prohibited by the Ascertainment Clause or any other provision of the Constitution, Congress may seek such assistance through the Salary Act and the Ad-

justment Act as its current choice of what it deems to be "necessary and proper."

To the extent that appellant's complaint is directed to the "one-House veto" provision of the Salary Act, the complaint has been satisfied by the excision of that provision by the Bartlett amendment of 1977, Public Law 95-19, 91 Stat. 45 (J.S. 5). That amendment, which has no effect on appellant's claims respecting the Adjustment Act, or on his basic misconception respecting the Ascertainment Clause, does operate to blunt much of the alleged importance of appellant's case, with its constant emphasis on seeking "prospective" relief only (J.S. 31). With roll call votes assured for all future quadrennial compensation recommendations under the Salary Act, appellant's concern about the efficacy of his vote respecting such recommendations and the alleged duty of Congressmen to express themselves as to matters of their compensation becomes all the more "a matter of form rather than substance" (J.S.App. 8a).

Disposition of this appeal need not await consideration of the pending petitions for certiorari in two other cases arising under the Salary Act – *Atkins v. United States*, No. 77-214, and *McCorkle v. United States*, No. 77-486.[3] Unlike the appellant here, the petitioning federal judges in *Atkins* and the petitioning federal executives in *McCorkle* are complaining about specific "one-House vetoes" that deprived them of increased compensation under the Salary Act. Appellant, on the other hand, is complaining only about salary increases and determinations that have occurred, or may occur in the future, without the "one-House veto" necessarily having been invoked. And he is

[3] See *Atkins v. United States*, 556 F.2d 1028 (Ct. Cls., 1977); *McCorkle v. United States*, 559 F.2d 1258 (C.A. 4, 1977).

complaining about increases from which he has benefited, or will benefit in the future.

Moreover, neither *Atkins* nor *McCorkle* involves the Ascertainment Clause, which is applicable only to Congressional compensation and which is the central feature of the instant appeal. As appellant himself has stated (J.S. 31), his claim, "like Article I, Section 6 of the Constitution itself, is restricted solely to the question of Congressional salaries," a claim that is obviously not "directly" involved in *Atkins* (J.S. 32). The Ascertainment Clause is simply not at issue in *Atkins* or *McCorkle*, and this appeal can safely be affirmed without awaiting disposition of the petitions in those two cases.

Moreover, appellant has disavowed any claim that his arguments affect the propriety of the Salary and Adjustment Acts "insofar as they create a procedure for determining executive or judicial salaries" (J.S. 31), which of course is the procedure challenged in *Atkins* and *McCorkle*. And appellant has specifically asserted (J.S. 31) that the method of determining non-Congressional salaries under the Acts "is readily severable from the methods for ascertaining Congressional ones." Be that as it may, this assertion suggests another distinguishing factor – that appellant nowhere contends that the legislative veto provisions of the statutes he attacks are severable from the statutory scheme. That the provisions are inseverable was the sole matter decided by the Fourth Circuit in *McCorkle* (559 F.2d 1258) and thus is the controlling issue presented in the *McCorkle* petition in this Court; and the *McCorkle* ruling has injected the severability issue into the *Atkins* proceeding in this Court, by way of a supplement to the petition for certiorari. The severability issue, which may be decisive in this Court's consideration of the *Atkins* and *McCorkle* petitions, thus serves to distinguish still further the instant appeal, where no such issue is presented.

One final note is in order. Much of the significance of this appeal, insofar as it involves any question as to the "one-House veto" provision in the Salary Act, has been dissipated by the repeal of that provision. Much the same can be said about the attacks on that provision in the *Atkins* and *McCorkle* petitions. But the instant appeal is so totally oriented toward prospective relief as to make that repeal almost decisive of the inappropriateness of noting jurisdiction here. In the context of this appeal, no purpose would be served in fully briefing and arguing about a repealed provision or in this Court rendering an advisory opinion as to the constitutionality of a "one-House veto" provision that has no future life.

CONCLUSION

For these reasons, the appeal should be dismissed or, alternatively, the judgment below should be summarily affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

LARRY PRESSLER, APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE SECRETARY OF THE TREASURY TO AFFIRM

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MOTION OF THE SECRETARY OF THE TREASURY TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Solicitor General, on behalf of the Secretary of the Treasury, moves to affirm the judgment of the district court.

OPINIONS BELOW

The initial decision of the district court (J.S. App. 3a-10a) is reported at 428 F. Supp. 302. The order of the district court reinstating its initial decision (J.S. App. 1a-2a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on July 19, 1977. A notice of appeal to this Court (J.S. App. 24a-26a) was filed on August 2, 1977. The jurisdictional statement was filed on September 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether certain of the procedures contained in the Postal Revenue and Federal Salary Act of 1967, as amended, and the Executive Salary Cost-of-Living Adjustment Act of 1975, by which new rates of compensation for members of Congress have been established, are constitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1, of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6, of the Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. * * *

Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*, before its amendment in 1977 by Pub. L. 95-19, 91 Stat. 45, is set forth at J.S. App. 27a-32a. Pub. L. 95-19 is set forth in pertinent part at J.S. 5. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 89 Stat. 421, 2 U.S.C. (Supp. V) 31, is set forth in pertinent part at J.S. 5-6.

STATEMENT

Appellant, a member of the House of Representatives since 1975 (J.S. App. 3a), challenges the constitutionality of two statutes under which the salaries of Senators and Representatives have been determined.

The first statute, the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*, established a Commission on Executive, Legislative, and Judicial Salaries, composed of nine members.[1] The Commission recommends to the President, once every four years, specific pay rates for Senators, Representatives, federal judges, and certain other officials in the Legislative, Executive, and Judicial Branches. 2 U.S.C. 356, 357. After receiving the Commission's report, the President is required to include in the next budget he submits to Congress "his recommendations with respect to the exact rates of pay which he deems advisable, for [specified] offices and positions within the purview of [the Salary Act]." 2 U.S.C. 358. Under the Salary Act before its amendment in 1977, the rates of pay recommended by the President became effective for the first pay period beginning thirty days after submission of the recommendations, or on a later date specified by the President, unless (l) Congress enacted a statute providing for rates of pay other than

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[1]Three members of the Commission are appointed by the President, and two members each are appointed by the President of the Senate, the Speaker of the House and the Chief Justice. 2 U.S.C. 352.

those the President had proposed or (2) either House of Congress "enacted legislation which specifically disapproves all or part of such recommendations * * *." 2 U.S.C. (1970 ed.) 359(1)(B).

A salary increase recommended by the President under the Salary Act in 1969 was not disapproved and became effective in that year. A further increase recommended in 1973 was disapproved by a Senate resolution in 1974 and did not become effective.[2] An increase recommended in January 1977, after this suit was filed, was not disapproved and has become effective.

On April 12, 1977, the one-House veto provision of the Salary Act was eliminated by Pub. L. 95-19, 91 Stat. 45. The statute as amended requires both Houses to conduct separate votes upon Presidential salary recommendations. Only if both Houses approve a recommendation can it become effective.

The second statute at issue is the Executive Salary Cost-of-Living Adjustment Act of 1975, 89 Stat. 421, 2 U.S.C. (Supp. V) 31, which provides a separate and additional mechanism for increasing congressional salaries. The Adjustment Act makes members of Congress, federal judges, and certain other high-ranking government officials subject to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*, which authorizes annual adjustments to the salaries of federal employees governed by General Schedule pay rates and other specified statutory pay systems. The amounts of annual salary adjustments authorized under the Federal

[2] The validity of the Senate's action is at issue in *Atkins* v. *United States*, petition for a writ of certiorari pending, No. 77-214, and *McCorkle* v. *United States*, petition for a writ of certiorari pending, No. 77-486.

Pay Comparability Act is determined by the President in accordance with the detailed standards prescribed by 5 U.S.C. 5305(a) and (b), which are designed to make federal salaries comparable and competitive with salaries found by the President to be prevailing in the private sector. The Adjustment Act directs that congressional, judicial, and certain other salaries are to be annually adjusted by the same percentage as the overall percentage adjustments in GS salaries made under the Comparability Act. See 2 U.S.C. (Supp. V) 31.

In 1975, the President ordered adjustments under the Comparability Act averaging 4.49 percent to be made in the salaries of employees subject to the GS pay system (Executive Order 11883, 40 Fed. Reg. 47091), which became effective on or shortly after October 1, 1975. As a result, congressional salaries were increased at the same time from $42,500 to $44,600 pursuant to Section 204(a) of the Adjustment Act (34 Fed. Reg. 2241; 40 Fed. Reg. 47099).[3]

Appellant filed the present suit in May 1976 seeking a declaratory judgment that the Salary Act and the Adjustment Act violated Article I, Section 6, of the Constitution, which requires that "[t]he Senators and Representatives shall receive a Compensation for their

[3] On October 1, 1976, after the present suit had been filed but before the court had dismissed the complaint, the President announced that further cost-of-living adjustments averaging 4.83 percent would be implemented for the first pay period after October 1, 1976. Executive Order 11941, 41 Fed. Reg. 43889. Such adjustment would have increased congressional salaries to $46,800 per annum. The adjustment was not implemented, however, because Congress specifically refused to appropriate the necessary funds in the Legislative Branch Appropriation Act of 1977, Pub. L. 94-440, 90 Stat. 1439. See H.R. Conf. Rep. No. 94-1559, 94th Cong., 2d Sess. 3 (1976).

Services, to be ascertained by Law * * *" (J.S. App. 11a). Appellant also sought an injunction prohibiting appellees from disbursing congressional salary increases pursuant to those statutes (*ibid.*).[4] On October 12, 1976, a three-judge district court, convened pursuant to 28 U.S.C. (1970 ed.) 2282, dismissed the complaint (J.S. App. 3a-10a). The district court held that appellant had standing on the basis of his allegation that his legislative vote "was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution" (J.S. App. 6a). But the court rejected appellant's position on the merits, holding that the Salary Act and the Adjustment Act satisfy the requirement of Article I, Section 6 (J.S. App. 8a-10a).

Appellant appealed to this Court (No. 76-1005). On May 16, 1977, this Court vacated the district court's judgment and remanded the case for further consideration in light of Pub. L. 95-19, which, as noted (p. 4, *supra*), repealed the one-House veto provision of the Salary Act and substituted the requirement that both Houses must affirmatively approve salary increases under that Act (431 U.S. 169; J.S. App. 22a). On remand, the district court determined that the new legislation does not affect appellant's claims, and it therefore reinstated its prior order (J.S. App. 1a-2a).

ARGUMENT

1. Petitioner's principal argument here, as in his previous appeal, is that the Ascertainment Clause of Article I, Section 6, requires that congressional pay-setting statutes must specify the exact dollar amount of

[4]Appellant now apparently seeks an injunction limiting salary payments to Congressmen to their 1967 level, $30,000, which is 52.2 percent of their current salary of $57,500 (see J.S. 31).

congressional salaries and prohibits such statutes from delegating to the President any authority to participate in the determination of the dollar amount (J.S. 16-23, 24). The district court correctly rejected that contention. The Ascertainment Clause does not by its terms require Congress itself to specify the exact dollar amounts of congressional salaries. It requires only that congressional compensation "be ascertained by Law," and there is no contention that the Salary Act and the Adjustment Act are not "laws" (see J.S. 24).

This Court has consistently declined to restrict Congress to rigid and inflexible procedures in carrying out its constitutional powers. See *Federal Energy Administration* v. *Algonquin SNG. Inc.*, 426 U.S. 548; *United States* v. *Richardson*, 418 U.S. 166, 178, n. 11; *Yakus* v. *United States*, 321 U.S. 414, 424-427. The various statutes providing for the determination of the pay levels of officials and employees of the three branches of government are complex and interrelated. General constitutional principles do not prohibit Congress from enacting mechanisms and prescribing procedures to be used in determining such pay levels. "Necessity * * * fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules * * *." *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 105.

The Ascertainment Clause does not impose more stringent requirements with respect to laws governing congressional compensation. The history of the Ascertainment Clause reveals that the Framers intended only to ensure that Congress be accountable to the public for the salary of its members (see J.S. 17-19). The procedures challenged by appellant are fully consistent with the goal of public accountability. Congress remains accountable

for compensation paid pursuant to statutes that it has enacted and can revise.[5] As the district court correctly concluded (J.S. App. 9a-10a):

> Congress continues to be responsible to the public for the level of pay its members receive. There is no concealment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment phase [*sic*]. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which [appellant] seeks.

2. The Bartlett Amendment, Pub. L. 95-19, 91 Stat. 45, repealed the one-House veto provision of the Salary Act, 2 U.S.C. (1970 ed.) 359(1)(B), and substituted a provision that salary increases recommended by the President shall become effective only if both Houses affirmatively approve the recommendation. While the Bartlett Amendment further ensures that Congress shall be publicly accountable for its own salary increases and thus further undermines appellant's constitutional argument, it does not, as appellant would require, specify the precise dollar

[5]In addition, Congress can refuse to appropriate funds for a salary increase authorized to be paid under either the Salary Act or the Adjustment Act—a power that Congress exercised in 1977 (see note 3, *supra*).

amounts of congressional salaries.[6] The district court therefore correctly concluded on remand that the Bartlett Amendment does not affect appellant's claims.

3. In our view, the district court erred in holding that appellant had standing merely because he claimed that "the availability of the procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious" (J.S. App. 7a). The Salary Act and the Adjustment Act do not deprive appellant of his right or ability to introduce or vote on legislation providing for or prohibiting salary increases. If appellant is unable to gain the support of a majority of his fellow legislators to enact such legislation, the Salary Act and the Adjustment Act are not to blame.

Appellant's claim in essence is that the Salary Act and Adjustment Act improperly delegate legislative authority. Appellant's interest in challenging an allegedly unconstitutional delegation is not personal to him or peculiar to his status as a member of Congress. It is a "generalized grievance [ ] about the conduct of government" (*Flast* v. *Cohen*, 392 U.S. 83, 106), that is shared

[6]The Bartlett Amendment may be subject to constitutional challenges on grounds other than the Ascertainment Clause in particular, challenges based on the claim that the congressional review procedure established by that Amendment constitutes lawmaking without the formal participation of the President, as required by Article I, Section 7 of the Constitution. Appellant's complaint did not raise that issue and it is not presented in this case.

Appellant for the first time, however, suggests that "[t]he propriety of any form of Congressional veto is also questionable, as legislative veto provisions raise a number of Constitutional questions * * *" (J.S. 21). Appellant has not expressly challenged past or present congressional review provisions either in this Court or the court below and the validity of those provisions is not a question appellant presents to this Court (see J.S. 4). Cf. *Atkins* v. *United States* and *McCorkle* v. *United States*, *supra*.

in substantially equal measure by all citizens. That interest is not a sufficient basis for appellant's invocation of the judicial process. *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D Pa.), affirmed, 401 U.S. 901. See also *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220; *United States* v. *Richardson, supra*, 418 U.S. at 173; *Ex parte Levitt*, 302 U.S. 633, 634; *Massachusetts* v. *Mellon*, 262 U.S. 447, 488; *Fairchild* v. *Hughes*, 258 U.S. 126, 129-130.[7] Appellant's lack of standing constitutes a further ground for affirming the dismissal of his complaint.

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[7]Moreover, although appellant has donated part of his increased compensation to charity (see J.S. 31), he has retained some of the increased compensation he has received under the statutes he challenges in this litigation (*ibid.*). He therefore is in the position of asking this Court to violate the principle of " 'not pass[ing] upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' " *Fahey* v. *Mallonee*, 332 U.S. 245, 255, quoting from *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (Brandeis, J., concurring). Although this principle has been "applied unevenly in the past" (*Arnett* v. *Kennedy*, 416 U.S. 134, 153 (plurality opinion)), it nevertheless presents an additional obstacle to appellant's efforts to establish the existence of a personal injury in fact.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DECEMBER 1977.

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WE THE PEOPLE

WE THE PEOPLE is a Washington State, non-partisan, public interest group organized for the purpose of encouraging and permitting greater citizen participation in the processes of our government.

WE THE PEOPLE address the public policy issues in this case brought by the Honorable Larry Pressler, Congressman of the First District of South Dakota. Appellant challenges the constitutionality of Section 225 of the Postal Revenue and Salary Act of 1967 and Section 204 (a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 as violative of Article I, Sections 1 and 6 of the Constitution. Our challenge is based on the effects this legislation has on the relationship between Congress and the American public.

WE THE PEOPLE addresses itself to the public policy, not legal questions involved in this appeal. The public policy questions involve accountability, code of ethics and historical incomes ratio between Congress and the people.

ARGUMENT

1. Accountability

The voters have a right to hold their Congressmen accountable for salary increases. People have placed Congressmen in a position of trust, a position that demands accountability for their actions to the people they represent. No clearer evasion of that trust can be found than in the recent absences of recorded votes. The practice is deceptive and further undermines the confidence of the voters in their elected government, an action that weakens the very foundation of our nation, a government by the people. The voter is disenfranchised in this instance, because he cannot know how his Congressman would have voted.

The recently enacted Bartlett Amendment does not address the past, but the future. The amendment fails to offer satisfactory redress. It in effect tells Congress that they have been forgiven if they sin no more.

The Constitution mandates that the Senators and Representatives shall ascertain their own compensation. Nowhere do we find language permitting delegation of this responsibility, nor language suggesting that the compensation of Congress shall be intertwined with the salaries of the Judiciary and Executive branches of government.

The timing of the recent salary increase is a further abrogation of accountability. Timing the salary increase immediately following an election is clearly an evasion of accountability, incompatible with an open and honest relationship between Congressmen and the public, which has so recently voted them into office.

2. Ethics

WE THE PEOPLE strenuously disagrees with the concept that Congress is somehow entitled to a pay raise by enacting a Code of Public Conduct for its Members. The American public has an absolute right to expect high ethical standards for its elected officials. Although a Code of Public Conduct is eminently desirable, it should not be premised on some form of monetary ransom. It is as though they were offered over an extra thousand dollars a month just to be honest.

Although President Ford and the Commission on Salaries emphasized that such a Code of Public Conduct was to accompany the salary increases, Congress recently acted on these increases without insisting on an independent special prosecutor to address the scandal of payments by a foreign government to Congressmen. Nor has Congress acted on lobbyists' disclosure, or the covert use of franking, public funds, public rooms and public employees for campaign purposes.

3. Congressional vs. Public Incomes

There has been an historical relationship between incomes of Congressmen and the people, a ratio that in the recent instance has been fractured. The ratio between Congressional income and the family income of Americans has been two or three to one. The present increases place the ratio at four to one. Furthermore, in comparing the consumer price index to Congressional salaries, we note that the index has increased 50% since 1969, whereas Congressional salaries have increased 92%.

SUMMARY

Congress is elected by the public. It is entrusted to operate our government, answering directly to the people. The issue of salaries for elected officials is central to the voter's expectation of integrity. At a time of great public concern over ethical conduct of public figures, our Congress should not be bartering a pay raise in exchange for a Code of Public Conduct. Nor should Congress be delegating to a non-elective commission the authority to set Congressional salaries. Accountability is thus abrogated. The voter is disenfranchised by lack of a recorded vote by his Congressman. The recent salary increase occurred immediately following an election, thus further compounding the lack of accountability. The historical ratio between the incomes of the elected public servant and the average family is twisted and distorted.

The Court should recognize the public policy questions of accountability, code of ethics, and historical incomes ratio between Congress and the people, thus agreeing to a full hearing on the merits of the appeal by Congressman Pressler.

Respectfully submitted,

John Sonneland

John Sonneland
Chairman, on behalf of
WE THE PEOPLE

DATED this 6th day of October, 1977, in Spokane, Washington.

Randall L. Stamper

Randall L. Stamper
Attorney-at-Law

CERTIFICATE OF SERVICE

I. John Sonneland, hereby certify that I have served this brief of WE THE PEOPLE as amicus curiae on each of the parties by depositing three copies in the United States mail, air mail, postage prepaid, to each of the following:

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John Sonneland

John Sonneland

No. 77-450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

WARREN M. BLUMENTHAL,
Secretary of the Treasury;
FRANCIS R. VALEO,
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KENNETH R. HARDING,
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Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES M. JEFFORDS, *et. al.*,
Amici

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

1. Congressman James Jeffords, on behalf of himself and on behalf of Congressmen James Abdnor (R-S. Dakota), Clarence Miller (R-Ohio), Charles Grassley (R-Iowa), Richard Gephardt (D-Missouri), Romano Mazzoli (D-Kentucky), John Duncan (R-Tennessee), James Collins (R-Texas), Berkley Bedell (D-Iowa), Millicent Fenwick (R-N.J.), Leon Panetta (D-Cal.), Margaret Heckler (R-Mass.), Nick Joe Rahall (D-W. Va.), Mickey Edwards (R-Okla.), Robert Walker (R-Penn.), James Cleveland (R-N.H.), Anthony Moffett (D-Conn.), Dan Glickman (D-Kansas), and William Cohen (R-Maine) requests leave of the Court to submit an *amicus curiae* brief in support of the appeal by Congressman Larry Pressler (No. 77-450).

2. Congressman Jeffords submitted an *amicus* brief in the case below and has maintained an active interest in the case from its inception.

3. Congressman Pressler has consented to and expressed his interest in this *amicus,* but attorney for an Appellee has stated his objection to the submission of it.

4. While Congressman Pressler has expressed his views articulately on the merits of his case, we believe it is important to establish that his views are not isolated but represent a broad spectrum of the Congress, and that the bipartisan nature of the group of Congressman submitting this *amicus* is an important indication to the Court that Congressional procedures have been such as to frustrate the voice of a majority of the Congress on an issue of vital importance to the Congress and its national constituency.

5. The Congressmen here submitting this request to file such *amicus* believe the Court's decision in this appeal will have a direct impact on the actions of the *amici* in discharging their constitutional obligations under Article I, Sections 1 and 6. Second, the disposition of this appeal will substantially affect the ability of the voters represented

by the *amici* to determine the position of their elected representatives with respect to the rates of Congressional pay. Third, the rates of compensation paid to each of the *amici* as members of Congress may be directly affected by the Court's decision in this appeal.

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Interest of the Amici

The *amici curiae* submitting this brief are duly elected members of the Ninety-Fifth Congress of the United States. As members of Congress, the *amici* have a three fold interest in the outcome of this appeal. First, the Court's decision in this appeal will have a direct impact on the actions of the *amici* in discharging their constitutional obligations under Article I, Sections 1 and 6. Second, the disposition of this appeal will substantially affect the ability of the voters represented by the *amici* to determine the position of their elected representatives with respect to the rates of Congressional pay. Third, the rates of compensation paid to each of the *amici* as members of Congress may be directly affected by the Court's decision in this appeal.

ARGUMENT

I. THE STATUTORY PROVISIONS AT ISSUE SUBSTANTIALLY IMPAIR THE EFFICACY OF THE VOTE OF EACH MEMBER OF CONGRESS.

The rate of compensation for each Member of Congress is presently computed on the basis of two statutes: The Postal Revenue and Salary Act of 1967[1] and the Executive Salary Cost-of-Living Adjustment Act of 1975.[2] Under these statutes, Congressional salary rates are adjusted periodically in amounts determined by the

1. Pub. L. No. 90-206, 81 Stat. 642, *codified at* 2 U.S.C. §§ 351-361.

2. Pub. L. No. 94-82, 89 Stat. 421, *codified at* 2 U.S.C. § 31.

President.[3] Congressional involvement in the adjustment of its members' compensation is restricted under both statutes to a limited power of disapproval. To exercise this power of disapproval, one House of Congress must act affirmatively within thirty days to reject the salary adjustments recommended by the President. In the absence of an affirmative resolution of disapproval, the salary rates recommended by the President automatically go into effect.

Amici believe that the statutory procedures for Congressional disapproval of Presidential salary recommendations substantially impair the efficacy of their votes as Members of Congress in ascertaining the rates of Congressional compensation.

The power of Congressional disapproval under the statutes at issue in this appeal must be exercised, if at all, within thirty days of the relevant Presidential salary recommendation. In legislative terms, thirty days is an extremely brief period of time for securing any type of affirmative action. Although Congress has, on occasion, taken affirmative action on a matter in less than thirty days, such expeditious treatment normally is possible only when there is overwhelming support in favor of the measure and there is some extraordinary outside circumstance requiring extremely speedy action. As a consequence, even though a majority of one House of Congress may be opposed to a salary adjustment recommended by the President, the thirty day time limit on the power of disapproval may make it impossible for Members of Congress to have an opportunity to cast their votes.

3. Both the Salary Act, *supra*, note 1, and the Cost-of-Living Act, *supra*, note 2, provide for commissions to study and report on appropriate salary adjustments. These commissions report to the President, who, in turn, recommends to Congress the adjustments which go into effect unless the increases are rejected by a resolution of disapproval. 2 U.S.C. §§ 31 (2), 351-359, 5 U.S.C. § 5305.

The reverse nature of the disapproval power, which allows new governmental action to be initiated if no Congressional action is taken, also impairs the efficacy of each Member's vote. The parliamentary procedures used in the Senate and House of Representatives have been developed solely to regulate the process by which Congress enacts affirmative legislation. These parliamentary procedures include numerous methods by which a small minority can delay action that is desired by a substantial majority. So long as Congress is acting by affirmative legislation, all of the various procedural devices for delay tend to have the salutary effect of ensuring that Members of Congress will have ample time for deliberation and consultation before some new governmental action is taken. In the case of a thirty day disapproval power, however, all of the devices for delay operate to frustrate, rather than foster, the goal of deliberate Congressional action.

In the final analysis, the decision to bring a salary adjustment disapproval resolution up for floor action depends not upon the will of the majority in either House, instead it depends almost exclusively upon the discretion of the majority leadership and the committees to which the resolution has been referred.

Disapproval resolutions, like all other legislative proposals, are normally referred to committees after introduction. If the House and Senate committees fail to report a disapproval resolution in time for floor action within the statutory thirty day time limit, the pay raise recommendation in question will normally take effect without any opportunity for Members of Congress to vote on the question. This, in fact, has been the fate of virtually all of the salary adjustment disapproval resolutions introduced in the past.[4]

4. See notes 9-11, *infra*.

In the House of Representatives there are only two basic ways that a disapproval resolution not reported by committee can be brought to the floor for a vote: By motion to discharge the committee and by motion to suspend the rules. Neither of these devices is of any significant value in forcing a vote on a salary adjustment disapproval resolution.

Motions to discharge a committee cannot be introduced in the House until the measure that is the subject of the motion has been pending before the committee for more than thirty days.[5] Since Congressional power to disapprove a pay raise recommendation is limited to thirty days, the salary adjustment in question will always take effect before a motion to discharge can be introduced. Moreover, the motion to discharge a committee would probably be of little value even if the statutory period for disapproval was longer than thirty days. Motions to discharge are rarely introduced, largely because of traditional deference to the committee system. Furthermore, the relatively few motions to discharge that are introduced frequently fail because such a motion cannot be acted upon until a majority of the full House has formally joined in sponsorship of the motion.[6]

Motions to suspend the rules are of equally little value in forcing floor action in the House or a disapproval resolution stalled in committee. Motions to suspend the rules normally are in order in the House only on the first and third Mondays of each month. Motions to suspend the rules require a two-thirds majority for passage and must, upon demand by any Member, be seconded by a simple majority in a teller vote.[7] Finally, and most importantly,

5. House Rule XXVII. 4.

6. *Id.*

7. House Rule XXVII. 1, 2.

the Speaker of the House has absolute discretion in recognizing any Member who rises to move suspension of the rules.

In the Senate, the procedures for bringing a measure stalled in committee to the floor are somewhat more flexible than those in the House. Motions to discharge a committee may be introduced in the Senate without a waiting period and passage requires only a simple majority. Motions to suspend the rules in the Senate also may be introduced at any time. However, if any Senator objects to either type of motion, the motion must lay over one day, after which it is eligible for floor action in the order of its placement on the calendar. As a practical matter, the leadership of the Senate can avoid floor action on any such motion by recessing each legislative day before the measure comes up on the calendar. This was the fate of one of the Senate efforts to disapprove the most recent Congressional pay raise recommendation.[8]

One final method for forcing floor action is available in the Senate. That method is to offer the disapproval measure as an amendment to some other unrelated legislative business. This alternative is possible because the Senate does not normally require that amendments be germane to the subject matter of the proposal being amended. A disapproval resolution offered in the form of an amendment to some other legislative proposal, however, is still subject to the possibility of a filibuster as well as the possibility that the underlying proposal could be defeated.

In the face of all of these obstacles, the ability of individual Senators and Representatives to record their votes on the "enactment" of a salary adjustment is severely curtailed.

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8. See 123 Cong. Rec. S 2127, 2128 (Feb. 3, 1977).

II. THE STATUTORY PROCEDURES AT ISSUE IN THIS APPEAL SUBSTANTIALLY IMPAIR THE VOTERS' ABILITY TO ASCERTAIN THE POSITION TAKEN BY THEIR SENATORS AND REPRESENTATIVES.

One of the essential elements of any representative democracy is the ability of the voters to ascertain the position taken by their elected officials. To preserve the representative character of Congress, Article I, Section 5 of the Constitution requires that:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same. . .; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present be entered on the Journal.

Thus the constitution contemplates that no new governmental action can be authorized by Congress without: (1) a record being made of the action in the Journal of each House and (2) a record being made of each Member's vote if such a record is requested by one-fifth of the Members present.

The statutory procedures for adjusting Congressional pay at issue in this appeal effectively nullify all of the protections afforded to the public by Article I, Section 5. Under the statutes in question, there is no instance in which either House must vote to enact an increase in the salary rates for its members. Raises recommended by the President under the Salary Act can go into effect without any recorded action by either House, much less any recorded vote. Under the Cost-of-Living Adjustment Act, pay raises normally go into effect without even the possibility of Congressional disapproval.

Although either House of Congress can record its support in favor of a recommended pay raise if it wishes to do so, the actual experience under the statutes clearly shows that Congress is extremely reluctant to voluntarily record its views in support of a pay raise. To date, three Congressional pay raises have been recommended by the President under the Salary Act. Forty-seven Representatives introduced thirty-four resolutions of disapproval with respect to the first pay raise recommendation in 1969.[9] Ninety-five Representatives introduced sixty-three resolutions to disapprove the second pay raise recommendation in 1974.[10] Seventy-one Representatives introduced thirty-three resolutions to disapprove the third pay

9. H. Res. Nos. 128, 133, 136, 138, 139, 144, 145, 147, 149, 153, 155, 158, 162, 164, 165, 166, 170, 171, 173, 178, 181, 183, 186, 187, 190, 195, 196, 205, 208, 209, 210, 215, 221, 222, 91st Cong., 1st Sess. (1969). All of these disapproval resolutions were referred to the House Post Office and Civil Service Committee. That Committee did not organize itself in time to take action on any of the resolutions before the effective date of the recommended pay raise. In an effort to force floor action, fifteen Representatives introduced fourteen resolutions requiring consideration of the disapproval matter by the whole House. H.R. Res. Nos. 142, 146, 150, 159, 163, 172, 179, 188, 191, 193, 194, 203, 206, 207, 91st Cong., 1st Sess. (1969). These resolutions were referred to the House Rules Committee, which voted in executive session to table the measures.

10. H. R. Res. No.s 806, 807, 808, 811, 812, 813, 186, 817, 819, 820, 821, 826, 827, 828, 830, 831, 833, 834, 836, 837, 839, 841, 842, 844, 845, 849, 850, 851, 852, 853, 861, 866, 868, 869. 870, 875, 876, 879, 880, 882, 887, 888, 890, 891, 892, 893, 905, 908, 909, 910, 913, 914, 919, 922, 924, 925, 927, 936, 940, 941, 942, 946, 958, 93rd Cong., 2d Sess. (19740. These resolutions were referred to the House Post Office and Civil Service Committee. That Committee initially avoided the issue by failing to form a quorum, but four days after the Senate Post Office and Civil Service Committee reported a resolution that would have disapproved only the Congressional portion of the President's recommendations, the House committee reported a resolution (H. R. Res. 807) disapproving all of the pay raise recommendations, including the raises proposed for the Judicial and Executive branches. H. R. Rep. No. 870, 93rd Cong.,

raise recommendation in 1977.[11] Not a single one of these one hundred thirty disapproval resolutions ever reached the floor of the House or received a vote of any sort by the House membership.

The record in the Senate is only slightly better. A resolution to disapprove the first pay raise recommendation did reach a floor vote in the Senate in which disapproval was defeated by a narrow vote of 34-47.[12] The Senate passed by an overwhelming 71-26 majority a resolution disapproving the second pay raise recommendation.[13] A resolution to disapprove the third pay raise was defeated in the Senate by a vote of 42-56 on a motion to table.[14]

There is probably no coincidence in the fact that the House of Representatives (whose Members must stand for election every two years) has never voted on a Salary Act disapproval resolution while the Senate (whose members stand for election only every six years) has taken at least some form of recorded vote on each Salary Act

10. continued
2d Sess. (1974). The Senate resolution was amended on the floor to disapprove all of the pay raise recommendations and passed on March 6, 1974. Thereafter no action was taken by the House on the resolution reported by the House committee.

11. H. R. Res. Nos. 115, 126, 129, 135, 152, 191, 197, 201, 211, 225, 243, 244, 245, 247, 249, 250, 253, 254, 255, 258, 249, 260, 263, 264, 265, 272, 276, 277, 278, 281, 288, 290, 292, 95th Cong., 1st Sess. (1977). These resolutions were referred to the House Post Office and Civil Service Committee. That Committee held hearings on the disapproval issue but failed to report any of the resolutions out of committee.

12. *See* 115 Cong. Rec. 2716 (February 4, 1969).

13. *See* 120 Cong. Rec. S2878-2900 (March 6, 1974).

14. *See* 123 Cong. Rec. S2016 (February 2, 1977).

recommendation. It is also probably no coincidence that the one Salary Act recommendation actually disapproved was the only one which came before the Congress in a Congressional election year.

In addition to the Salary Act increase, there has been one Cost-of-Living Act adjustment. Under the terms of that act, the cost-of-living adjustment was not subject to Congressional disapproval. However, since the amount of the adjustment exceeded the amounts available under the Legislative Branch Appropriations Act, disbursements could not be increased to the rate ordered under the adjustment.[15]

In short, since 1967 two Congressional pay raises have gone into full effect, one has been defeated, and one has been nullified for lack of appropriations, but the voters have no recorded action by the House of Representatives on any of these pay raise measures and none of the votes recorded in the Senate were required by the statutes for the pay raises to go into effect. This performance falls far short of satisfying the voters' legitimate need to ascertain the position of their Senators and Representatives with respect to rates of Congressional pay.

III. THE ISSUE PRESENTED BY THIS APPEAL IS A TIMELY AND UNPRECEDENTED ONE WHICH DESERVES PLENARY CONSIDERATION IN THIS COURT.

As the District Court noted in its opinion, the issue presented by Congressman Pressler in this case is one of first impression. Memorandum Opinion at 5. No prior decision has ever considered the scope of Congress'

15. *See* Executive Order 11941 (October 1, 1976), 41 Fed. Reg. 43889, at 43894 (October 5, 1976).

obligations under Article I, Section 1 and the ascertainment clause of Article I, Section 6. The unprecedented nature of the question presented by Congressman Pressler, by itself, warrants plenary review of the appeal by this Court.

The issue presented is also one of timely and substantial public importance. In the past month, Members of Congress received a very sizeable pay raise under the Salary Act. Although the size of the pay raise was controversial, public concern focused primarily on the statutory procedures that allowed Congress to raise its own salary by doing nothing. Even those who defended the amount of the recent pay raise were almost unanimous in their condemnation of the statutory procedures at issue in this appeal.[16] The prospect of another automatic pay raise in October of this year has heightened public concern over the statutory procedures for adjusting Congressional pay.[17]

The issue presented in this appeal is also important because it is closely related to the broader controversy over the constitutionality of any form of Congressional veto. For years scholars have debated whether the Congressional veto device impermissibly impairs the veto power of the Executive branch.[18] At least four Presidents[19] and three

16. *See, e.g.*, Washington Post, Feb. 6, 1977, C-6, cols. 1 and 2.

17. *See, e.g.*, Washington Star, March 2, 1977, A-18, cols. 1 and 2.

18. *See, e.g.*, Boisvert, *A Legislative Tool for Supervision of the Administrative Agencies: The Laying System*, 25 Fordham L. Rev. 638 (1957); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 Geo. Wash. L. Rev. 468 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (19530; Stewart, *Constitutionality of the Legislative Veto*, 13 Harv. J. Legis. 593 (1976); Stone, *The Twentieth Century Administrative Explosion and After*, 52 Calif. L. Rev. 513 (1964); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. Ll Rev. 983 (1975).

19. 59 Cong. Rec. 8609 (1920) (veto message of President Wilson); 76

Attorneys General[20] have argued that legislative vetoes of various form are unconstitutional. Congress itself has studied but never resolved the question.[21] The issue was raised but not decided in *Buckley* v. *Valeo,* 424 U.S. 1 (1976).[22] The issue is again before this Court in *Clark* v. *Valeo*, No. 76-1105 (docketed February 9, 1977). Although the *amici* express no opinion on the merits of the arguments in *Clark* v. *Valeo,* they believe that plenary review of that case together with the appeal herein would present the Court with a unique opportunity to examine the effects of the Congressional veto on both the Legislative and the Executive branches of government.

CONCLUSION

For the reasons stated above, the *amici* believe that probable jurisdiction should be noted in this appeal.

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19. continued

Cong. Rec. 2445 (1933) (veto message of President Hoover); Jackson, *A Presidential Legal Opinion,* 66 Harv. L. Rev. 1353, 1357-1358 (1953) (memorandum from President Roosevelt to then Attorney General Jackson); H. R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952) (veto message of President Truman).

20. 37 Ops. Atty. Gen. 56 (1953); Jackson, *A Presidential Legal Opinion,* 66 Harv. L. Rev. 1353, 1355-1357 (1953); Unpublished memorandum dated January 31, 1977 from Attorney General Griffin Bell to President Carter.

21. *See, e.g.,* Senate Committee on Government Operations, Vol. II, Congressional Oversight of Regulatory Agencies, at 116, 95th Cong., 1st Sess. (1977).

22. 424 U.S. at 140 n. 176, *but cf. id.* at 282-286 (White, J., concurring & dissenting). *See* Clagget & Bolton, *Buckley v. Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing,* 29 Vand. L. Rev. 1327, 1344-1353 (1976).